Supreme Court, U.S.
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No. 86-69

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, *et al.*,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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APPENDIX A

SUPREME COURT OF VERMONT
NOVEMBER TERM, 1984

No. 83-484

AMERICAN TRUCKING ASSOCIATIONS, INC., CHEMICAL LEAMAN TANK LINE[S], INC. and ANDERSON TRUCKING SERVICE, Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Commissioner of Motor Vehicles; PAUL PHILBROOK, Vermont Commissioner of Public Safety; RICHARD SNELLING, Governor of State of Vermont and THOMAS EVSLIN, Secretary of Vermont Agency of Transportation

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[Filed Feb. 21, 1986]

On appeal from Washington Superior Court

James L. Morse, J.

Ralph A. Foote, Robert H. Moyer, and Charles Starbuck of Conley and Foote, Middlebury, for plaintiffs-appellees

John J. Easton, Jr., Attorney General, and Zander B. Rubin and Robert C. Schwartz, Assistant Attorneys General, Montpelier, for defendants-appellants

PRESENT: Allen C.J., Hill, Underwood, Peck and Gibson, JJ.

PECK, J. The defendants appeal an order of the Washington Superior Court declaring unconstitutional statutes imposing fuel user license fees, 23 V.S.A. §§ 415, 3007, and trip permit fees or temporary authorization fees, 23 V.S.A. § 3010, on foreign-registered trucks. The lower court found that these statutes, challenged by plaintiffs in a class action,[1] violated the Commerce Clause of the United States Constitution by discriminating against interstate commerce. The court held the statutes unconstitutional because under the statutory scheme foreign truck owners or operators must pay certain fees which are not offset by complementary domestic or foreign taxes on Vermont-registered trucks.

Defendants appeal, alleging, first, that the trial court sitting in equity and consisting of a presiding judge and an assistant judge, had no jurisdiction to hear the case; and second, the fees imposed pursuant to the challenged statutes do not violate the Commerce Clause of the United States Constitution. We disagree and affirm the trial court's decision.

The plaintiffs also appeal the lower court's order denying platinffs' motion for a court-ordered refund of any

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[1] Pursuant to a stipulation filed with the superior court, the named plaintiffs represent:

> the class of all interstate motor carriers whose base truck registrations are issued by jurisdictions other than the State of Vermont (that is the persons owning or operating motor trucks upon the highways of the State not registered or required to be registered in this State, in the language of 23 V.S.A. § 3007(b)), and who are now or may in the future become subject to the requirements and liable for payment of the fees set forth in 23 V.S.A. §§ 415, 3007, and 3010 and section 15(c), all as enacted and amended pursuant to Number 172 of the Acts of the 1982 (1981 adjourned) session of the Vermont Legislature.

fees, fines or penalties collected pursuant to the objectionable statutes. We affirm the denial of a refund.

In 1982 this Court considered another challenge to the constitutionality of certain fees imposed by Vermont on foreign-registered trucks. *American Trucking Associations, Inc. v. Conway*, 142 Vt. 17, 451 A.2d 42 (1982). There the plaintiff class challenged a fee system imposed by 23 V.S.A. §§ 415-419 (Cum. Supp. 1982) (Act 87).[2]

In the earlier case, this Court vacated the judgment of the lower court, which had upheld the fee system imposed under Act 87, and remanded for further factual findings. *Id.* at 23, 451 A.2d at 45. During the pendency of the appeal of that case, *American Trucking Associations, Inc., supra*, the Vermont legislature amended the fee system for foreign trucks by 1982, No. 172 (Adj. Sess.) now codified at 23 V.S.A. §§ 415-423 (Cum. Supp. 1982) (Act 172). *American Trucking, supra*, 142 Vt. at 19, 451 A.2d at 43. In this case, we consider the validity of the fee system imposed under Act 172.

Act 172 provides that owners or operators of trucks weighing 18,000 pounds or more, and operated on Vermont highways, whether registered in the state or not,

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[2] We summarized Act 87:

> Act No. 87 required operators of trucks with a gross weight of 18,000 pounds or more which were registered outside of Vermont to obtain a permit, costing $40, for each truck that would be owned or operated in Vermont. *Id.* at § 18 (codified at 23 V.S.A. § 415 (Cum. Supp. 1982)). In addition, a fee was charged for each time a foreign-registered truck entered the state. The entry fee was $15, with a surcharge of $10 if the foreign truck was registered in a state that imposed more than one tax on trucks using its highways. *Id.* at § 19 (codified at 23 V.S.A. § 417 (Cum. Supp. 1982)). In lieu of these two charges, operators could purchase a single trip permit, which authorized a single entry into Vermont for a fee of $40. *Id.* at § 18a (codified at 23 V.S.A. § 415a (Cumm. Supp. 1982).

American Trucking Associations, Inc. v. Conway, supra, 142 Vt. at 18, 451 A.2d at 42.

must either: (1) pay a $50.00 annual fuel user's license fee, 23 V.S.A. §§ 415, 3007; (2) acquire a "single trip permit," costing $50.00, 23 V.S.A. § 3010(a); or, (3) acquire a "temporary authorization" costing $50.00, 23 V.S.A. § 3010(b). There is no dispute that each of the above-mentioned statutes would produce the same effect—owners or operators of trucks weighing 18,000 or more must pay $50.00 to use Vermont highways. For the purposes of this opinion, any reference to the "$50.00 user fee" is a reference to all three of the challenged statutes, 23 V.S.A. §§ 415, 3007 and 3010(a), (b). In an amendment to the motor vehicle registration provision, Act 172 reduced by $50.00 the annual registration fee owed by owners of Vermont-registered trucks weighing 18,000 pounds or more. 23 V.S.A. § 367.

Plaintiffs sought declaratory and injunctive relief, contending that the fees imposed, under Act 172, on out-of-state trucks constituted an unlawful burden on interstate commerce and otherwise violated their rights under the Commerce Clause of the United States Constitution, the Supremacy Clause of the United States Constitution, the Revised Interstate Commerce Act, 49 U.S.C. § 10101 et seq., the Fourteenth and Fifth Amendments to the United States Constitution, the Privileges and Immunities Clause of the United States Constitution, and Article 9 of Chapter I of the Vermont Constitution. In addition to the request for injunctive and declaratory relief, plaintiffs sought repayment by the State of any fees collected pursuant to the challenged statutes.

When it considered the challenged statutes in conjunction with the registration fee refund of $50.00 which benefited only Vermont-registered trucks, 23 V.S.A. § 367, the trial court ruled that the statutes, 23 V.S.A. §§ 415, 3007 and 3010, all violated the Commerce Clause of the United States Constitution. However, the lower court neither discussed nor decided plaintiffs' other claims. In a motion to alter judgment, plaintiffs requested that the

fees already collected under Act 172 be refunded. The court denied the motion. Defendants filed a timely appeal of the court's order declaring the statutes unconstitutional, while plaintiffs appealed the court's order denying them monetary relief.

I.

Defendants' first claim on appeal is that the judgment is void for lack of jurisdiction, given the presence of an assistance judge during the adjudication of equitable matters. Under *Soucy v. Soucy Motors, Inc.*, 143 Vt. 615, 620, 471 A.2d 224, 227 (1983), this fact would require reversal. In *Solomon v. Atlantis Development, Inc.*, 145 Vt. 70, 74-76, 483 A.2d 253, 256-57 (1984), however, we held that *Soucy* will be applied prospectively only. Because the court decided this case prior to December 12, 1983, the date *Soucy* was issued, this case is not subject to reversal under *Soucy*.

Nevertheless, under our law prior to *Soucy*, the presence of assistant judges in cases in equity could require reversal. See *Maskell v. Beaulieu*, 140 Vt. 75, 453 A.2d 699 (1981); *Pockett v. LaDuke*, 139 Vt. 625, 432 A.2d 1191 (1981). Here, however, the case was decided on stipulated facts, so there was no hearing and no fact-finding by the assistant judge. In *Brower v. Holmes Transportation, Inc.*, 140 Vt. 114, 435 A.2d 952 (1981), we determined that the assistant judges' presence did not constitute an improper influence "where only a legal ruling as to summary judgment is involved." *Id.* at 118, 435 A.2d at 954. Therefore, the unanimous decision based upon stipulated facts submitted without a hearing does not require reversal under pre-*Soucy* law.

II.

Next we consider defendants' claim that the trial court erred when it ruled the challenged statutes unconstitutional under the Commerce Clause of the United States Constitution.

Initially, we must consider defendants' contention that the lower court improperly applied the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Defendants contend that *Complete Auto*'s test only applies to commerce clause challenges to statutes which impose taxes on the privilege of doing business in the state, not "use" taxes. The proper test in our case, according to defendant, is the one employed in the pre-*Complete Auto* line of cases known as "flat fee" cases. See, e.g., *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935). The third prong of the *Complete Auto* test—whether the tax discriminates against interstate commerce—is also an element of the test employed in the flat fee cases. See, e.g., *Aero Transit Co., supra*, 332 U.S. at 501-03. The challenged components of Act 172 fail to survive scrutiny under this "discrimination" element or prong; therefore, it does not matter which test is applied.

The trial court ruled that the challenged statutes, 23 V.S.A. §§ 415, 3007 and 3010, violated the Commerce Clause of the United States Constitution, in part, because the tax discriminates against interstate commerce. The United States Supreme Court has ruled that a state tax is not *per se* invalid because it burdens interstate commerce as interstate commerce may be made to pay its way. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Nevertheless,

> [o]ne of the fundamental principles of Commerce clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See

> *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) .

Id. at 754. The challenged provisions of Act 172 discriminate against interstate commerce by providing a direct commercial advantage to Vermont truckers. See *Westinghouse Electric Corp. v. Tully*, 104 S. Ct. 1856, 1865-68 (1984). The trial court noted that, in considering the user fee requirements of the Act, it could not "but be aware of the consequences of the most recent amendments to the licensing and registration statutes," also part of the Act. We, too, are unable to ignore the registration statute and its effect. Act 172 not only imposed the annual $50.00 fees which have been directly challenged; but it also reduced by $50.00 the registration fee owed by Vermont truck operators or owners with trucks weighing 18,000 pounds or over, who would otherwise be subject to the challenged $50.00 fee. The registration fee reduction shifts the entire impact of the user fee legislation onto foreign operators, thereby discriminating against them.

We note that foreign truck owners who have complied with their home state registration requirements need not register their trucks in Vermont if the operators' home jurisdictions afford Vermont-registered trucks the same benefit. 23 V.S.A. § 411. The parties stipulated to the fact that virtually all United States jurisdictions have similar reciprocity and registration provisions. Thus, as stipulated, virtually all motor trucks pass freely in interstate commerce if they have complied with their home state registration requirements. But, if the challenged Act were given effect, foreign truck operators, in the class subject to the fees, would be burdened with an additional

cost of doing business if they decided to use Vermont highways. Vermont truckers, on the other hand, would be effectively exempt from the additional fees imposed by Act 172.

One might argue that any foreign-registered truck owner or operator could take advantage of the credit allowed Vermont truckers by simply registering their trucks in Vermont. That is, members of the plaintiff class, whose trucks are already registered in their home states, could avoid the Vermont use taxes challenged here by registering their trucks in Vermont. However, if Vermont could impose such a tax, then so could every other state throughout the nation. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). One can hardly imagine a result more "destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana, supra*, 451 U.S. at 754. If, in order to avoid paying user fees in other states they entered, truckers were required to register their trucks in those other states, the cost of doing interstate business would be greatly increased thereby burdening interstate commerce.

Defendant also argues that the Vermont registration fees, as well as purchase and use taxes, paid by Vermont truckers are complementary and therefore offset the user fees. We disagree. Vermont has statutorily exempted foreign truckers from the registration fees, 23 V.S.A. § 411, and the purchase and use tax, 32 V.S.A. §§ 8902 (2) and 8903(a), (b). When a Vermont trucker pays his registration fee and his purchase and use tax, the Vermont trucker, by virtue of the reciprocity agreements, purchases the right to operate in other states as well as Vermont. See *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 627 (Me. 1981). On the other hand, under Act 172 when a foreign trucker pays the challenged user fee, he only buys the right to use Vermont roads; however, he already contributed indirectly

to the Vermont highway maintenance fund by virtue of reciprocity. *Id.* Act 172 forces foreign-based truckers to pay yet another fee for the use of Vermont highways without also enacting the same fee from Vermont truckers. We affirm the lower court's decision that provisions of Act 172, 23 V.S.A. §§ 415, 3007 and 3010, are unconstitutional and unenforceable.

III.

We now turn to plaintiffs' appeal of the trial court's decision denying plaintiffs' request for repayment of fees, fines or penalties collected pursuant to the objectionable statutes.

As noted above, in their prayer for relief, plaintiffs asked that the lower court order defendants to repay plaintiffs any fees or penalties "wrongfully, illegally or unconstitutionally collected pursuant to the challenged statutes." Further, the parties stipulated that if parts of Act 172 were declared unconstitutional, any fees or penalties "wrongfully or illegally obtained by the State of Vermont . . . may be refunded pursuant to 23 V.S.A. § 3020, . . . 23 V.S.A. § 328 or in any other manner ordered by such court." In its initial order of July 27, 1983, the trial court failed to address the refund issue. In response to plaintiffs' subsequent motion to alter judgment, the lower court denied plaintiffs' refund request for three reasons. The court indicated that (1) because its jurisdictional power was confined to declaring the rights of the parties and ordering prospective relief, a declaratory judgment was sufficient without the need for injunctive relief; (2) a monetary judgment was barred by the doctrine of sovereign immunity; and, (3) while the superior court recognized that it could conduct a de novo review of a decision of the Commissioner of Motor Vehicles, 23 V.S.A. § 3023, there was no such decision by the Commissioner in this case.

At the outset, we note that the stipulation regarding the refund, quoted above, provides little assistance in resolving this issue. The stipulation represented an agreement that, should the superior court or higher court declare Act 172 unconstitutional *and* should that court order the state to repay fees and penalties, the refund would be made "pursuant to 23 V.S.A. § 3020 . . . 23 V.S.A. § 328 or in any other manner ordered by such court." Thus, it cannot be argued that by stipulation the defendants conceded that the superior court had to refund the collected fees if it declared the statute invalid. Rather, the stipulation only recites possible repayment methods *should* the named courts order the refund. This stipulation has no effect until a court orders the refund of the taxes. This we decline to do.

We base our decision on sovereign immunity. In Vermont, the State cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character. *Stoneman v. Vergennes Union High School District #5*, 139 Vt. 50, 53, 421 A.2d 1307, 1309 (1980). The imposition of a tax on fuel users for highway maintenance is an essential governmental activity, which could be performed only by a governmental entity. See *Dugan v. City of Burlington*, 135 Vt. 303, 304-05, 375 A.2d 991, 992 (1977), *Haselhuhn v. Huron-Clinton Metropolitan Authority*, 106 Mich. App. 461, 468, 308 N.W.2d 190, 193 (1981).

However, suits challenging the constitutionality of a state statute or its enforcement are not considered suits against the State for purposes of sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949); *Stoneman, supra*, 139 Vt. at 53, 421 A.2d at 1309 (1980). But an action to recover money which would be payable from state funds may be barred as a suit against the State. *Larson, supra*, 337

U.S. at 691 n.11; see also *Agency of Environmental Conservation v. Casella*, 142 Vt. 503, 505, 457 A.2d 633, 634 (1983).

This distinction is grounded in the principle of sovereign immunity that the state legislature should determine the State's liability for money judgments. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" The Federalist No. 81, at 511-12 (A. Hamilton) (Wright ed. 1961) (emphasis in original).

The United States Supreme Court's analysis of when a suit is against a state for Eleventh Amendment purposes also supports this distinction. See e.g., *Quern v. Jordan*, 440 U.S. 332, 337-38 (1979) (federal court's power is limited to prospective relief and may not include a retroactive award payable from the state treasury); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (retroactive award of disability benefits wrongfully withheld barred as a suit against the state); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 463 (1945) (suit for a refund of taxes allegedly collected in violation of the Commerce Clause is a suit against the state).

This action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the State has waived its immunity. Appellees argue that 23 V.S.A. § 3020(b) is a waiver of sovereign immunity which would compel a refund in this case.

23 V.S.A. § 3020(b) provides:

> If the commissioner determines that a tax, penalty, interest or fee required by this chapter has been paid more than once by a licensee, or has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited to the tax account of the licensee . . . . Any balance of the excess amount remaining in the licensee's account

> after crediting the overpayment shall be refunded if requested . . . .

This section has the clear purpose of redressing errors in the enforcement or implementation of the diesel fuel tax. It merely provides for a refund mechanism if errors are made in determining what tax is imposed. "Although it has been stated that 'the courts will adjudge monetary claims founded upon statute, because the Legislature has inferentially indicated an intent to provide the sums needed to make good the statutory scheme', in this case such an inference is negated by the fact that the Legislature denied funding." *Stoneman, supra,* 139 Vt. at 54, 421 A.2d at 1310 (citation omitted). Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid. The legislature may be presumed to rely on the receipt of tax revenues received from valid properly administered enactments. The power to levy taxes and appropriate the resulting funds is a fundamental attribute of sovereignty. That power would be sorely compromised if private citizens were able to do what the executive branch may not do—spend state funds without legislative appropriation. "Where no appropriation has been made, no action for a money judgment can be maintained." *Id.* Therefore, we affirm the denial of a refund of taxes collected under Act 172.

Affirmed.

FOR THE COURT:

/s/ Louis P. Peck
Associate Justice

APPENDIX B

SUPREME COURT OF VERMONT
NOVEMBER TERM, 1984

Supreme Court Docket No. 83-484

ENTRY ORDER

AMERICAN TRUCKING ASSOCIATIONS, INC., CHEMICAL LEAMAN TANK LINE[S], INC. and ANDERSON TRUCKING SERVICE, Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Commissioner of Motor Vehicles; PAUL PHILBROOK, Vermont Commissioner of Public Safety; RICHARD SNELLING, Governor of State of Vermont and THOMAS EVSLIN, Secretary of Vermont Agency of Transportation

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[Filed Feb. 21, 1986]

Appealed From Washington Superior Court
Docket No. S-185-82WnC

In the above entitled cause the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

Concurring:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ William C. Hill
WILLIAM C. HILL
Associate Justice

/s/ Wynn Underwood
WYNN UNDERWOOD
Associate Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

APPENDIX C

SUPREME COURT OF VERMONT

APRIL TERM, 1985

No. 83-452

AMERICAN TRUCKING ASSNS., INC., INTERNATIONAL TRANSPORT, INC., HARNUM, B.H., INC., Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Comm'r., Motor Vehicles, PAUL PHILBROOK, Comm'r., Public Safety, RICHARD SNELLING, Governor, State of Vermont, and THOMAS EVSLIN, Secretary, Agency of Transportation, each individually and in their official capacities

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[Filed Feb. 21, 1986]

On Appeal from Washington Superior Court

Edwin H. Amidon, Jr., J., Acting Superior Judge

Ralph A. Foote, Robert H. Moyer, and Charles Starbuck of Conley and Foote, Middlebury, for plaintiffs-appellants

Jeffrey L. Amestoy, Attorney General, and Robert C. Schwartz, Assistant Attorney General, Montpelier, for defendants-appellees

PRESENT: Allen, C.J., Hill, Peck, Gibson and Hayes, JJ.

PECK, J. This is an appeal by the plaintiff class [1] from the November 16, 1983, judgment order of the Washington Superior Court, which dismissed plaintiffs' action with prejudice. Plaintiffs had challenged the constitutionality of a set of statute which authorized the imposition of certain fees upon truck owners or operators whose trucks were not registered in Vermont. The trial court upheld the fee system as constitutional. We reverse.

Vermont adopted the challenged fee system in 1981. 23 V.S.A. §§ 415-419 (Cum. Supp. 1982) (Act 87). We have previously summarized Act 87:

> Act No. 87 required operators of trucks with a gross weight of 18,000 pounds or more which were registered outside of Vermont to obtain a permit, costing $40 for each truck that would be owned or operated in Vermont. *Id.* at § 18 (codified at 23 V.S.A. § 415 (Cum. Supp. 1982)). In addition, a fee was charged for each time a foreign registered truck entered the state. The entry fees was $15, with a surcharge of $10 if the foreign truck was registered in a state that imposed more than one tax on trucks using its highways. *Id.* at § 19 (codified at 23 V.S.A. § 417 (Cum. Supp. 1982)). In lieu of these two charges, operators could purchase a single trip permit, which authorized a single entry into Vermont for a fee of $40. *Id.* at § 18a (codified at 23 V.S.A. § 415a (Cum. Supp. 1982)). None of these fees were assessed against Vermont registered trucks.

American Trucking Associations, Inc. v. Conway, 142 Vt. 17, 18-19, 451 A.2d 42, 42-43 (1982). The fees were paid into the "Transportation Fund" for construction and maintenance of Vermont highways.

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[1] The members of the plaintiff class were defined by court order as "all interstate motor carriers primarily registered outside of the State of Vermont and now or during pendency of this action subject to payment of fees prescribed by 23 V.S.A. § 415, § 415a and § 417."

In 1981 plaintiffs attacked Act 87 on constitutional grounds, alleging, among other things, that the fee system violated the Commerce Clause of the United States Constitution. Plaintiffs requested declaratory, injunctive and monetary relief. The trial court held the fee system constitutional and plaintiffs appealed. This Court vacated the judgment of the lower court and remanded for additional findings of fact. *Id.* at 23, 451 A.2d at 45. On remand the trial court again declared the Act constitutional. The new judgment was based, in part, on a stipulation of the parties adopted in the original court decree, the findings as amended, and the original conclusions of law. The stipulation included an agreement that:

> But for the registration fees provided for in 23 V.S.A. 367 and 23 V.S.A. 371 (a), the purchase and use taxes [32 V.S.A. § 9701-9818] assessed by the State of Vermont, and the gasoline fuel taxes assessed on fuels purchased in the State of Vermont, carriers whose motor vehicles are registered in the State of Vermont pay no fees, taxes or other asessments to the State of Vermont for the operation of their motor trucks within the boundaries of Vermont.

The original findings included:

> All of the United States jurisdictions impose registration licensure on the domiciliary motor trucks. It is thus a fact that virtually all motor trucks pass freely, as far as compliance with registration requirements is concerned, in interstate commerce throughout the nation if they have complied with the registration requirements of their state of domicile.

The trial court held the fee system imposed under Act 87 did not discriminate against interstate commerce because it operates as a compensation tax. In effect, the court held that the Act 87 fees imposed on foreign-registered truckers were offset by, or served to compensate for, the fees imposed on *only* Vermont registered truckers—

registration fees, 23 V.S.A. § 367, and the purchase and use taxes, 32 V.S.A. §§ 9701-9818.

The fees imposed by Act 87 are not "compensatory" and are violative of the Commerce Clause. A state tax "is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Nevertheless, the state's right to tax interstate commerce is limited. Two tests have been employed by the United States Supreme Court in considering the constitutionality of taxes affecting interstate commerce. The parties disagree as to which test should be applied.[2] To survive a Commerce Clause challenge under either test, the state-imposed tax must not discriminate against interstate commerce. We need not decide which test applies as Act 87 fails under the discrimination prong of both.

As indicated by the Supreme Court:

> One of the fundamental principles of Commerce Clause jurisprudence that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local busi-

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[2] The proper test, according to plaintiffs, is the one announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977):

1. Is the taxed activity sufficiently connected to the State to justify a tax?
2. Is the tax fairly related to benefits provided the taxpayer?
3. Does the tax discriminate against interstate commerce?
4. Is the tax fairly apportioned?

On the other hand, defendant contends the proper test is the one employed in a pre-*Complete Auto* line of cases known as "flat fee" cases. See, e.g., *Capitol Greyhound Lines v. Buce*, 339 U.S. 542 (1950); *Aero Transit Co. v. Comm'rs*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 259 U.S. 285 (1935).

> ness." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

Maryland v. Louisiana, supra, 451 U.S. at 754.

The defendants apparently conceded that all members of the plaintiff class are engaged in interstate commerce. On the other hand, for the purpose of this case, Vermont-registered trucks constitute an element of local or intrastate commerce. Given this fact, we conclude Act 87 on its face discriminates against interstate commerce and violates the Commerce Clause. In *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 627 (Me. 1981), a statute requiring foreign trucks in Maine to pay much higher permit fees than Maine truckers was ruled facially discriminatory and violative of the Commerce Clause. Similarly, under Act 87 foreign-registered truckers must pay the fees while Vermont-registered truckers and their customers are protected from the impact of the tax. Members of the plaintiff class are at a competitive disadvantage. It is true that the members of the plaintiff class need pay neither Vermont registration fees, 23 V.S.A. § 411[3], nor the sales and use

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[3] Any motor vehicle owned by a nonresident shall be considered registered in Vermont if the nonresident owner has complied with the laws of his home state. This exemption only applies to the extent that the laws of the nonresident's home state grant similar exemptions to Vermont-registered motor vehicle owners and operators. Since the members of the plaintiff class have all complied with their home state registration requirements, they need not register in Vermont unless their home states do not grant similar privileges to Vermonters.

taxes, 32 V.S.A. § 8903[4]. They need not pay these fees and taxes *only because* they have registered their vehicles, and therefore paid their registration fees, in their home state. Having thus waived the right to impose either the sales and use tax or the registration fee upon foreign-registered trucks, Vermont may not point to those taxes as complementary for the purpose of saving an otherwise discriminatory tax. As the Maine Supreme Judicial Court said:

> When an owner or operator of a Maine-based truck pays his registration fee, he purchases the right to operate in any of 46 states; the highway use fee set by section 246-A, by contrast, buys for the foreign-based truck only the right to use Maine roads. In a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.

American Trucking Associations, Inc. v. Quinn, 437 A.2d at 627.

When the members of the plaintiff class registered in their home states they purchased the right to operate in states like Vermont with registration reciprocity similar to that embodied in 23 V.S.A. § 411. Just like the plaintiffs in Maine, the members of the plaintiff class have already indirectly contributed to Vermont's treasury by virtue of this reciprocity. Thus, the sales and use taxes and the registration fees imposed on Vermont truckers are not complementary to and do not save the facially discriminatory provisions of Act 87.

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[4] Members of the plaintiff class need not pay the purchase and use tax because they have never registered their vehicles in the State of Vermont.

Plaintiffs' claim for monetary relief is controlled by our opinion in *American Trucking Associations, Inc. v. Conway*, —— Vt. ——, 508 A.2d 408 (1986), in which we held that sovereign immunity barred a similar claim. Accordingly, we deny this claim for monetary relief.

FOR THE COURT:

/s/ Louis P. Peck
Associate Justice

APPENDIX D

SUPREME COURT OF VERMONT
APRIL TERM, 1985

ENTRY ORDER

Supreme Court Docket No. 83-452

AMERICAN TRUCKING ASSNS., INC., INTERNATIONAL TRANSPORT, INC., HARNUM, B.H., INC., Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Comm'r., Motor Vehicles, PAUL PHILBROOK, Comm'r., Public Safety, RICHARD SNELLING, Governor, State of Vermont, and THOMAS EVSLIN, Secretary, Agency of Transportation, each individually and in their official capacities

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[Filed Feb. 21, 1986]

Appealed From Washington Superior Court
Docket No. S-217-81WnC

In the above entitled cause the Clerk will enter:

Reversed.

FOR THE COURT:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

Concurring:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ William C. Hill
WILLIAM C. HILL
Associate Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON, III
Associate Justice

/s/ Thomas L. Hayes
THOMAS L. HAYES
Associate Justice

APPENDIX E

SUPREME COURT OF VERMONT

No. 82-021

AMERICAN TRUCKING ASSOCIATIONS, INC. and INTERNATIONAL TRANSPORT, INC., and G. H. HARNUM, INC., individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, PAUL PHILBROOK, RICHARD SNELLING, and THOMAS EVSLIN

Sept. 7, 1982

Before BARNEY, C.J., and BILLINGS, HILL, UNDERWOOD and PECK, JJ.

HILL, Justice.

This case presents a challenge to the constitutionality of various fees imposed on trucks from other states for entering Vermont. The trial court upheld the fees as constitutional. We vacate and remand for further factual findings.

The named plaintiffs, American Trucking Association[s] and two individual trucking firms, instituted this class action on behalf of all interstate motor carriers whose vehicles were primarily registered in states other than Vermont. The plaintiffs principally challenged a fee system imposed by the Vermont Legislature in 1981 on for-

eign registered trucks. The challenged provisions were adopted in the Act of May 13, 1981, No. 87, §§ 18-19a, 1981 Vt. Acts 329, 340-42 (codified at 23 V.S.A. §§ 415-419 (Cum.Supp.1982)) (hereinafter Act No. 87). Act No. 87 required operators of trucks with a gross weight of 18,000 pounds or more which were registered outside of Vermont to obtain a permit, costing $40, for each truck that would be owned or operated in Vermont. *Id.* at § 18 (codified at 23 V.S.A. § 415 (Cum.Supp.1982)). In addition, a fee was charged for each time a foreign registered truck entered the state. The entry fee was $15, with a surcharge of $10 if the foreign truck was registered in a state that imposed more than one tax on trucks using its highways. *Id.* at § 19 (codified at 23 V.S.A. § 417 (Cum.Supp.1982)). In lieu of these two charges, operators could purchase a single trip permit, which authorized a single entry into Vermont for a fee of $40. *Id.* at § 18a (codified at 23 V.S.A. § 415a (Cum. Supp.1982)). None of these fees were assessed against Vermont registered trucks.

A critical aspect of Act No. 87 was its repeal of 23 V.S.A. § 419 (1978), which permitted the Commissioner of Motor Vehicles to make reciprocal agreements with officials from other states waiving the imposition of the fees. Vermont had such agreements with thirteen states and the District of Columbia when Act No. 87 was enacted. The state cancelled all these agreements by June 15, 1981.

The plaintiffs also challenged the validity of the fee system in place before the passage of Act No. 87. That system required foreign registered trucks to pay an annual fee of $20 for a permit to travel on Vermont highways. 23 V.S.A. § 415 (1978). Truckers could elect to purchase a single trip permit for $20. 23 V.S.A. § 415a (1978). In addition, the state imposed a $10 fee for each entry into Vermont on trucks from states which

taxed Vermont trucks for using their highways. 23 V.S.A. § 417 (1978).

The plaintiffs requested declaratory, injunctive, and monetary relief. They claimed that the two fee systems violated the commerce clause of the United States Constitution, the supremacy clause of the United States Constitution, and the privileges and immunities clause of the United States Constitution. They also claimed that the tax schemes violated article nine of chapter one of the Vermont Constitution.

The trial court rejected the plaintiffs' claims. It held that the fee system survived constitutional scrutiny under both the state and federal constitutions. The plaintiffs appealed from that judgment.

During the pendency of this appeal, the Vermont Legislature again amended the fee system for foreign trucks. In the Act of April 20, 1982, No. 172, §§ 4-7a, 1981 Vt. Acts 188, 209-11 (Adj.Sess.) (codified at 23 V.S.A. §§ 415-423 (Cum.Supp.1982)) (hereinafter Act No. 172), the legislature imposed a uniform $50 fee on all trucks powered by nondiesel fuels. The fee applies to trucks registered in and outside of Vermont. *Id.* at § 4 (codified at 23 V.S.A. § 415 (Cum.Supp.1982)). In addition, Act No. 172 repealed Act No. 87's entry fee for each time a foreign truck entered Vermont, and substituted a "retaliatory" tax; if a foreign truck is registered in a state that imposes certain fees on Vermont trucks, that truck is required to pay a $10 fee each time it enters Vermont. *Id.* at § 19 (codified at 23 V.S.A. § 417(a) (Cum.Supp. 1982)). Act No. 172 also restored the Commissioner's power to make reciprocal agreements with other states to waive truckers' fees, and directs the Secretary of Transportation to negotiate with other New England states to establish a regional system for truckers' fees. *Id.* at §§ 7, 7a (codified at 23 V.S.A. §§ 419, 423 (Cum. Supp.1982)).

The validity of Act No. 172 has never been at issue in this case. Thus, the sole issue in this appeal is whether the plaintiffs are entitled to refunds for taxes collected under Act No. 87 and its predecessor system, on the ground that the taxes were unconstitutionally exacted.

The plaintiffs' most substantial claim[1] is under the commerce clause of the United States Constitution. To be upheld under that clause, Act No. 87 and its predecessor must survive the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). There, the Supreme Court held that a tax on interstate commerce will be upheld if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279, 97 S.Ct. at 1079. The plaintiffs do not challenge Act No. 87 or its predecessor under the first two prongs of this test. They limit their attacks to claims that the fee system discriminated against interstate commerce and did not fairly relate to services provided by Vermont.

The trial court rejected the plaintiffs' assertion of discrimination on the grounds that (1) the fees collected from foreign trucks were not significantly disproportionate to those collected from Vermont trucks, and (2) the fees were not a discriminatory tax in addition to the foreign trucks' registration fees in their domiciliary states, because Vermont trucks could be subjected to such fees in other states. This form of analysis reflects the

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[1] The plaintiffs' claims under the fourteenth amendment and article nine of chapter one of the Vermont Constitution also rest on the asserted discriminatory impact of the taxes. Thus, the factual findings on the effect of the taxes are critical to these claims as well. We also postpone consideration of the plaintiffs' supremacy clause claim until we have the benefit of further findings on the discrimination issue.

practical approach endorsed by the Supreme Court in *Complete Auto Transit.* The indicia of constitutionality is the actual impact of a tax on interstate commerce. *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981). Nevertheless, while we concur in the methodology employed by the trial court, we conclude that the trial court did not make adequate findings to either support its judgment or enable us to properly review its decision.

The decisive issue in this case is whether Act No. 87 and its predecessor placed an unfair burden on interstate commerce. "All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Department of Revenue v. Association of Washington Stevedoring Co.*, 435 U.S. 734, 748, 98 S.Ct. 1388, 1398, 55 L.Ed.2d 682 (1978). It has long been recognized that "interstate commerce must bear its fair share of the state tax burden." *Id.* at 750, 98 S.Ct. at 1399. The issue, then, is whether these schemes exacted unfair burdens, or simply assessed a fair share of the tax cost. Only a comparison of the costs imposed on foreign and domestic trucks in return for the services provided by Vermont sheds light on this inquiry.

The trial court's findings purport to make this comparison. Unfortunately, the findings are inadequate and contradictory. The court found that "certain foreign motor carriers would in fact save in their costs of operation if they were to register some or all of their motor vehicles in the State of Vermont." This, of course, is the essence of discrimination: the weight of the tax on the same truck is heavier if it is registered outside of Vermont. Yet, the trial court also found: "There is no evidence that the user fees paid . . . by foreign vehicles for use of Vermont highways are higher than such fees paid by Vermont registered vehicles through registration

fees and the vehicle purchase and use tax." The contradiction between these findings is inexplicable.

Moreover, the findings do not address critical evidence presented in the record. One of the named plaintiffs presented evidence showing that if all states imposed the fees mandated in Act No. 87, they would exceed its corporate earnings by tenfold. The trial court did not deal with this evidence. The court did make findings on the total costs and costs per mile of the named plaintiffs. There is, however, no comparison of the costs with those of Vermont truckers. On appeal, the plaintiffs argue that the costs imposed on Vermont trucks were substantially lower than those imposed on the foreign trucks. They base their argument upon raw data on Vermont truck usage, drawn from the record and multiplied by the statutory tax rates. If these data are accurate, the discrimination is manifest, severe, and unconstitutional. See *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 627 (Me. 1981). Without the benefit of findings on this point, however, we cannot say whether the actual impact of Act No. 87 and its predecessor on interstate commerce was discriminatory.

The trial court made findings concerning the proportion of the tax revenues contributed by foreign and Vermont trucks under the challenged fee system. The court also made findings concerning the proportionate numbers of foreign and domestic trucks using Vermont highways. These findings, however, tell us nothing about the critical facts, which are the number of miles travelled on Vermont highways by the two classes of trucks as compared to their respective tax burdens. As recently noted by the Maine Supreme Judicial Court, costs in the trucking industry are primarily calculated on a per-mile basis. See *id.* at 627 n.7. Only by comparing the cost per mile imposed by the fee systems on foreign as opposed to Vermont trucks can this Court assess whether the systems were actually discriminatory. The number

of foreign trucks using Vermont highways is irrelevant to this point.

Perhaps an even more telling flaw in the trial court's findings is the failure to distinguish the impact of the different tax schemes at issue. There are two systems, comprised of six separate levies, at issue in this case. The discriminatory impact of each of these levies may vary. Yet, the trial court's findings do not distinguish the impact of one system from the other. Nor do they separate the impact of the various levies within each system. These distinctions may amount to a world of constitutional difference. The impact of one levy within Act No. 87 may be constitutional while another levy is invalid. Simply because the plaintiffs have challenged all of these statutes en masse does not mean that the statutes may be judged en masse. The impact of the two systems, and the individual levies which comprise those systems, should be separately detailed in precise findings.

"Findings of fact made under V.R.C.P. 52 must state the facts essential to the disposition of the cause." *Van Velsor v. Dzewaltowski*, 136 Vt. 103, 106, 385 A.2d 1102, 1104 (1978). In this case, we are unable to determine from the findings whether the challenged statutes are unconstitutionally discriminatory. On remand, if the plaintiffs have failed to establish their burden of offering evidence on the facts necessary to their claims, findings to that effect would be appropriate. If, however, there is sufficient evidence in the record to make valid comparisons of the actual costs imposed by the separate levies of tax schemes on foreign and Vermont trucks, findings on these points must be made.

Judgment vacated. Cause remanded for further factual findings.

APPENDIX F

STATE OF VERMONT)
WASHINGTON COUNTY, SS.)

WASHINGTON SUPERIOR COURT

Docket No. S185-82 WnC

AMERICAN TRUCKING ASSOCIATION[S], *et al.*

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, *et al.*

OPINION AND ORDER

Plaintiffs have moved, pursuant to Rule 59(e), V.R.C.P., to alter the judgment order dated August 31, 1983 to include an order requiring the State to pay the Plaintiffs and the class they represent any fees, fines or penalties collected pursuant to the Diesel Fuel Tax Act (23 V.S.A. § 3007, 415, and 3010). By stipulation dated October 7, 1982, the parties agreed as follows:

> That in the event the Act is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. 3020. . . , 23 V.S.A. 328 or in any other manner ordered by such Court.

This action was commenced pursuant to this Court's jurisdiction to issue declaratory judgments, 12 V.S.A.

§ 4711, *et seq.*, *Neal v. Brockway*, 136 Vt. 119 (1978), and afford relief in cases involving substantial constitutional issues and threatened irreparable harm, *Auclair v. Vermont Electric Power Co.*, 133 Vt. 22, 24 (1974). Consequently, our jurisdictional power at this stage of the litigation is confined to declaring the rights of the parties and ordering prospective relief. We have determined that a declaratory judgment is sufficient without the need for injunctive relief.

Despite the stipulation recited above, this is a case where an award of a monetary judgment is barred by the doctrine of sovereign immunity of the type found in *Stoneman v. Vergennes School Dist. #5*, 139 Vt. 50, 54-55 (1980). *Accord, Edelman* v. *Jordan*, 415 U.S. 651 (1974) (collection of welfare benefits wrongfully withheld barred by sovereign immunity though prospective relief permitted).[1]

We recognize that the statute authorizes the Washington Superior Court to conduct a *de novo* review *"after* any decision, order or findings of the Commissioner of Motor Vehicles . . . ." 23 V.S.A. § 3023 (emphasis supplied).[2] Arguably, our powers of *de novo* review would permit us to determine whether taxes should be refunded. However, there has been no decision on the Commissioner's part in this case.

Since this case was not one pursuant to the Court's appellate jurisdiction conferred by 23 V.S.R. § 3023, Plaintiff's motion must be and is DENIED.

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[1] The issue of sovereign immunity involves the Court's jurisdiction over the subject matter and, as such, may be raised at any point in the proceedings. *Berry v. Arnoldware-Rogers, Inc.*, 127 Vt. 188, 192, 243 A.2d 781 (1968); cf. 5 Wright & Miller, *Federal Practice and Procedure* § 1212.

[2] Section 3020(b) permits the Commissioner of Motor Vehicles to refund a tax, penalty, interest or fee required by the Act which "has been illegally . . . collected."

Dated at Montpelier, County of Washington, and State of Vermont, this 7th day of December, 1983.

/s/ James L. Morse
JAMES L. MORSE
Superior Judge

/s/ Willis C. Bragg
WILLIS C. BRAGG
Assistant Judge

APPENDIX G

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

WASHINGTON SUPERIOR COURT

Docket No. S185-82WnC

AMERICAN TRUCKING ASSOCIATIONS, INC., and CHEMICAL LEAMAN TANK LINE[S], INCORPORATED and ANDERSON TRUCKING SERVICE, Individually and on behalf of all others similarly situated

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT, and PATRICK J. GARAHAN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION

OPINION AND ORDER

This is a challenge to the constitutionality of the diesel fuel, and non-diesel fuel user and trip licenses required on an annual basis for all motor trucks weighing over 18,000 pounds. The parties have submitted the case for decision on the merits on the basis of the following stipulated facts:

1. Plaintiff American Trucking Associations, Inc., ("ATA") is a national non-profit corporation organized and operating under the non-profit corporation laws of the District of Columbia and with its principal place of business located there. ATA is a federation of 51 state

trucking associations (including the District of Columbia) and 13 national conferences. It represents every type and geographical scope of motor carrier operation in the United States, including over 10,000 for-hire carriers, and tens of thousand of private and local carriers. Approximately 5,000 non-Vermont based motor carrier companies, operating a total of approximately 50,000 individual motor carrier vehicles, are subject to and will be affected by the fee requirements and penalty provisions imposed by No. 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature, upon and after the effective date of said Act, assuming their use of Vermont highways.

2. Plaintiff, Chemical Leaman Tank Line Incorporated (Chemical Leaman) is a Delaware corporation with its principal place of business in Lyonville, Pennsylvania. It is an interstate motor carrier as defined in the Interstate Commerce Act. Chemical Leaman operates 1691 tractors and trucks over 18,000 pounds each that are subject to the fee and penalty provisions set forth in the statutes complained of herein. Chemical Leaman is in full compliance with all requirements for highway taxes and fees as currently imposed by the State of Vermont.

3. Plaintiff, Anderson Trucking Service, Inc. (Anderson) is a Minnesota corporation with a principal place of business in St. Cloud, Minnesota. It is an interstate motor carrier as defined in the Interstate Commerce Act. Anderson operates 480 tractors over 18,000 pounds each that are subject to the fee and penalty provisions of the statutes complained of herein. Anderson is in full compliance with all requirements for highway taxes and fees as currently imposed by the State of Vermont.

4. Defendant William H. Conway (Conway) is the Commissioner of Motor Vehicles of the State of Vermont. Pursuant to state law, Defendant Conway is charged with responsibility for:

(a) acceptance of applications, collection of fees and issuance of licenses pursuant to Act No. 172 as hereinabove described;

(b) suspension or revocation of licenses pursuant to Act No. 172 as hereinabove described;

(c) acceptance of additional fees and penalties pursuant to Act No. 172 as hereinabove described, and

(d) the enforcement of appropriate penalty provisions contained in Act No. 172 as hereinabove described.

5. Defendant Richard Snelling, is the Governor of the State of Vermont and is the chief executive and law enforcement officer of the state. Among the statutes under which the defendant Snelling exercises authority is Title 23, Motor Vehicles, of Vermont Statutes Annotated, including the provisions of that Title as set forth in Act No. 172 as hereinabove described.

6. Defendant Paul Philbrook, is the Commissioner of Public Safety and as such is the chief enforcement officer save for the Governor, of all the statutes, rules and regulations pertaining to the laws of the road and is required by law to cooperate with the Vermont Commissioner of Motor Vehicles in carrying out all statutes, rules and regulations relating to the operation of motor vehicles in the State of Vermont.

7. Defendant Patrick J. Garahan, is the Secretary of the Vermont Agency of Transportation and as such is responsible pursuant to Chapter 55 of Title 3 V.S.A. for the planning, coordination and direction of the functions of the said agency, which includes under its aegis the Vermont Motor Vehicle Department.

8. Plaintiff ATA obtained from the Vermont Department of Motor Vehicles a listing of foreign based motor carriers who held Vermont annual highways use permits from the Department as of June 30, 1982. ATA also ob-

tained a listing of Vermont based motor carriers who had registered their vehicles in the State of Vermont as of June 30, 1982. A survey was conducted in July and August of 1982 by ATA based upon that information amongst all motor carriers so listed. Survey questionnaires were sent to 7,753 foreign based carriers. One hundred fifty-five (155) of those survey questionnaires were returned addressee unknown. There were 1,200 duplicate questionnaires sent out. Approximately 6,370 carriers were actually contacted. From the group, 1,247 survey responses were received.

Questionnaires were also mailed by ATA to 5,970 Vermont based carriers. Twenty-two (22) of the questionnaires were returned addressee unknown with questionnaires being received by 5,948 carriers. There were 237 responses to the survey from Vermont based motor carriers involved in interstate commerce. Two hundred forty-eight (248) motor carriers responded whose trucks were used exclusively in intra-state service within Vermont.

9. Fuel, as defined in Chapter 27 of Title 23 V.S.A. as added by Act No. 172 is diesel fuel or a blend thereof.

10. Pursuant to Act No. 172, users of fuel, such as the plaintiff class, are required to pay a tax burden on the amount of motor fuel used within Vermont. The Act provides a credit mechanism to insure that a motor carrier is not charged the same tax by two different states.

11. Members of the plaintiff class, as well as any others who operate motor trucks of over 18,000 pounds using gasoline and other non-diesel fuels pay a tax assessed upon any such fuel purchased in Vermont pursuant to Act No. 172.

12. But for the exceptions set forth in 23 V.S.A. 3007 and 415(a), all members of the plaintiff class, as well as all other persons, are required pursuant to Act. No. 172 to purchase either "diesel fuel user licenses" (23 V.S.A. 3007) or "non-diesel fuel user licenses" (23 V.S.A.

415(a) as amended) on an annual basis for all motor trucks of over 18,000 pounds operated by them within Vermont at an annual license fee per truck of $50.00.

13. As an alternative to and in lieu of the license fees required by 23 V.S.A. 3007 and 415(a), members of the plaintiff class are permitted to purchase trip permits, each such permit authorizing one trip into Vermont pursuant to 23 V.S.A. 3010 and 415(c) respectively, at a cost of $50.00 per trip.

14. The diesel fuel tax is levied on users of fuel within the state and expressly limits the tax to fuel actually consumed within the state. A proration scheme is included within the statute.

15. But for the exceptions set forth therein 23 V.S.A. 3007 provides, inter alia, that in addition to any other motor vehicle fees, all owners and operators of any motor truck over 18,000 pounds in gross weight which uses fuel as above defined must pay a $50.00 annual license fee for each such motor truck operating upon the highways of Vermont.

16. 23 V.S.A. 367(a), as amended by said Act No. 172, sets forth the annual fees for registration of motor trucks and provides, inter alia, that the annual registration fee for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00 less than the fee computed in accordance with that said statute.

17. 23 V.S.A. 3009 provides, inter alia, that the Commissioner of Motor Vehicles may suspend or revoke the fuel user's license of any person who fails to comply with any provision of the Chapter or any rule adopted pursuant thereto.

18. 23 V.S.A. 3010 provides, inter alia, that in lieu of paying the fee required by 3007 and paying a tax based on fuel usage in Vermont as required by 3014, an unlicensed user may pay a $50.00 single trip permit fee,

which permits one motor truck to operate in Vermont for a single trip not to exceed seven consecutive days.

19. 23 V.S.A. 3022 provides, inter alia, for the collection by the Commissioner of Motor Vehicles of the fees hereinbefore described, and in some instances, for the use of warrants therefore.

20. 23 V.S.A. 3024 provides, inter alia, that any person who willfully fails to comply with the provisions of Chapter 27 of said Title 23, shall be, in addition to any other penalties herein or elsewhere prescribed, guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than one year or both. In addition, it allows the imposition of up to a $2,000.00 fine upon a person who operates a motor vehicle in Vermont without obtaining the diesel fuel user's license and marker required in Section 3007.

27. 23 V.S.A. 415, as amended by Act. No. 172 aforesaid, provides inter alia, that in addition to any other provisions of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by a gasoline or any other non-diesel fuel, a person operating or owning a motor truck upon Vermont highways shall apply for a non-diesel fuel user's license and pay a fee of $50.00 for each such motor truck.

22. 23 V.S.A. 423 requires, inter alia, defendant Secretary of Transportation to negotiate for a compact or agreement with the other New England states which would require that the annual user license fee for each state should be $50.00 as provided by this Chapter for Vermont. To date, such compact has not been negotiated with authorized officials of the other New England States.

23. 23 V.S.A. 421(a), as amended by Act No. 172, provides, inter alia, that it is unlawful for any person to operate a motor truck without obtaining the permit required by 23 V.S.A. 415 or to violate any regulation issued by the Commissioner under the Chapter.

24. 23 V.S.A. 2201 provides, inter alia, that a traffic offense is defined, as amongst other things, a violation of diesel fuel user's licenses, non-diesel fuel user's licenses, or failure to maintain a log.

25. 23 V.S.A. 367 provides, as amended, and, provided prior to amendment, inter alia, a schedule for payment of annual registration fees by owners and operators for motor trucks operating on Vermont highways. 23 V.S.A. 411 provides, inter alia, that all foreign motor trucks which have complied with the registration fees imposed by their own jurisdiction shall be exempt from the payments called for under 23 V.S.A. 367, where such jurisdiction affords the same reciprocity to Vermont domiciliaries. Virtually all jurisdictions in the United States have similar reciprocity and registration provisions. Thus, virtually all motor trucks pass freely, as far as compliances with registration requirements are concerned, in interstate commerce throughout the nation if they have complied with the registration requirements of their own state of domicile.

26. The $50.00 motor fuel license fee imposed by 23 V.S.A. 3007 and 415(a) is a part of the motor fuel taxes imposed to create revenues for the state highway fund.

27. Vermont registered vehicles must obtain the same $50.00 diesel fuel user's license and non-diesel fuel user's license as foreign registered vehicles are required to obtain.

28. If a Vermont registered vehicle and a foreign based vehicle travelled the same number of miles in Vermont in a given year, the cost per mile during that year due to the $50.00 motor fuel license imposed by 23 V.S.A. 3007 and 415(a) for each of the two vehicles would be identical.

29. Vermont registered vehicles are unable to purchase the single-trip license authorized by 23 V.S.A. 3010 and 415(c).

30. By virtue of the nature of their operations, Chemical Leaman and Anderson, as well as the members of the class they represent, find predetermination as to which of their several vehicles will enter Vermont, and how many times, in a given year, is totally impossible and is subject to the vagaries of demand, routing and other factors. Likewise it is impossible to predetermine the number of miles a motor truck will be operating in Vermont either on a given trip or annually. However, the operations of such motor carriers when examined on a fleet basis, provide accurate average figures for the number of trucks to be qualified for use within the State of Vermont and the number of miles traveled to Vermont by each such carrier on an annual basis.

31. During the most recent annual period for which statistics are available (July 1, 1981 through June 30, 1982), plaintiff Chemical Leaman secured and displayed Vermont annual permits on 248 of its motor carrier vehicles which operated:

a. 8,170,361 miles everywhere, and

b. 54,041 miles within Vermont.

32. If each of plaintiff Chemical Leaman's 248 motor carrier vehicles was qualified to operated in Vermont at an annual cost of $50.00 each, as called for under Act No. 172, that would represent a total annual cost to the plaintiff of $12,400.00.

33. Based upon such projections, the average cost of the fuel licenses per mile traveled in Vermont to plaintiff Chemical Leaman would be 22.95 cents.

34. During the most recent annual period for which statistics are available (July 1, 1981 through June 30, 1982), plaintiff Anderson secured and displayed annual permits on 184 of its motor carrier vehicles which operated:

a. 3,209,741 miles everywhere, and

b. 80,873 miles within Vermont.

35. If each of plaintiff Anderson's 184 motor carriers vehicles was qualified to operate in Vermont at an annual cost of $50.00 each as called for pursuant to Act No. 172, that would represent a total annual cost to the plaintiff of $9,200.00.

36. The average cost of such fuel licenses per mile traveled in Vermont to plaintiff Anderson would be 11.38 cents.

37. The per mile costs set forth in this Stipulation are based upon the information obtained by ATA through its survey of Vermont and foreign based motor trucks as aforesaid. Based upon the data obtained for the year July 1, 1981 through June 30, 1982, contained in the questionnaires distributed by ATA and returned to it as described in a paragraph 8 hereof, costs per mile for foreign and Vermont based motor trucks have been calculated pursuant to the fee requirements of No. 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature to provide the Court with a statistical basis upon which to consider the effects of that Act.

38. Based upon a sample of 1,247 interstate motor carriers operating 23,873 vehicles in Vermont for the year, July 1, 1981 through June 30, 1982, the average cost per mile of compliance with the Vermont annual permit was 6.53 cents for motor carriers with motor carrier vehicles based in jurisdictions other than Vermont. This cost calculation is based upon a total Vermont annual plate cost and trip permit cost to these motor carriers of $1,193,650 divided by a total of 18,890,483 miles operated by the carriers' motor carrier vehicles within Vermont. The total miles operated by these carriers everywhere was 6,760,855,458 with the result that 0.28 percent of their total miles were operated in the State. See Attachment 1.

39. Based upon a sample of 237 interstate carriers for the year July 1, 1981 through June 30, 1982, the average

cost per mile of compliance with the Vermont fuel license would be 0.29 cents for motor carriers having interstate motor carrier vehicles registered in Vermont. This cost calculation is based upon a cost to the carriers of $34,050 divided by a total of 11,640,139 miles operated by the carriers in Vermont. The total miles operated by these carriers everywhere was 29,689,431, with the result that 39.20 percent of their total miles were operated in Vermont. See Attachment 2.

40. In addition to the survey replies received from the 237 motor carriers operating 681 interstate motor carrier vehicles registered in Vermont, the survey resulted in an additional responses from 248 motor carriers operating 363 motor carrier vehicles registered in Vermont. The vehicles of these carriers, however, were used exclusively in intrastate service within Vermont.

41. Based upon their experience in the year July 1, 1981 through June 30, 1982 the following motor carriers operating motor carrier vehicles based in Vermont would experience costs per mile of 0.50 cents or greater in complying with the fuel license requirements:

Registrant/Owner	Fuel License	Cost Per Mile
Henry James Bell	$50	$1.0000
Page, Gerald R.	$50	$0.5000
Martell, Louis E.	$50	$0.5000

42. Based upon their experience in the year-July 1, 1981 through June 30, 1982, the following motor carriers operating motor carrier vehicles based in states other than Vermont would experience costs per mile of fifty (50) cents or greater in complying with the Vermont fuel license or trip permit requirements:

Registrant/Owner	Fuel License Cost	Cost Per Mile
Southern Tier Hide Tallow	$300	$42.8571
Sammons Trucking	$1,850	$32.4561
Cardinal Transport Inc.	$8,300	$12.8482

Registrant/Owner	Fuel License Cost	Cost Per Mile
Delivery Service Corp.	$2,400	$10.6194
Dalec Enterprises	$100	$8.3333
Trend Line Furniture	$1,150	$7.9861
Anderson Peat Organic Com.	$100	$7.6923
Ashford Concrete Inc.	$100	$7.6923
Cushing, Larry	$350	$7.0000
Distribution SVC SYS Inc.	$10,700	$6.8326
Graphite Products	$150	$6.2500
Jarvie Mel Const Co Inc.	$1,100	$5.4187
Aubrey, Jay	$100	$5.0000
Chester Hide Skin Corp.	$200	$5.0000
Ryan E T Iron Works Inc.	$100	$5.0000
Sullivan Joseph P Co.	$50	$5.0000
Thruway Transfer Inc.	$250	$5.0000
Whittle Riley Inc.	$2,150	$4.1346
Green Field Transport Co.	$2,400	$3,9603
Burnham Van Service Inc.	$17,050	$3.9186
Werner R D Co Inc.	$850	$3.8812
Bama Transport Co.	$3,100	$3.8130
Carpet Center Lease Co Inc.	$400	$3.7735
Derosier Storage Co.	$100	$3.5714
Mix, James	$100	$3.3333
Bay State Lobster	$600	$2.8846
Stearlys Motor Freight	$600	$2.4691
Fitch Electronics	$100	$2.3809
Steel Transportation Co.	$100	$2.2727
A A Transport Inc.	$1,800	$2.2670
Murray Envelope Corp.	$400	$2.1978
Bird Trucking Inc.	$13,900	$2.1858
Colorado Kenworth Inc.	$650	$2.1594
Brookville Transport Ltd.	$300	$2.1428
Lakeshore Produce Limited	$150	$2.1126
Rollings Leasing Corp.	$72,300	$2.1051
Global Van Lines Inc.	$16,850	$2.0194
Bakelite Thermosets Ltd.	$200	$2.0000
South Hills Movers Inc.	$100	$2.0000
Springer Barry N Inc.	$100	$2.0000

Registrant/Owner	Fuel License Cost	Cost Per Mile
Hitchcock Bros Inc.	$50	$2.0000
Callahan Bros Inc.	$350	$1.9553
Beechler, Wm.	$50	$1.8518
Treadwell, Hollis	$100	$1.8518
Allens Transfer Storage	$500	$1.8181
Norfolk Rendering Wks.	$750	$1.7857
Interstate Van Lines	$3,500	$1.7721
Trans East Inc.	$500	$1.7482
Longmont Transport Co Inc.	$1,100	$1.7460
Geauga Truck Lines Inc.	$350	$1.6279
Wyman, Jasper C	$50	$1.6129
Steven Mark Inc	$850	$1.6037
Mich Tube Swagers Fab Inc.	$100	$1.5625
American Electric Corp.	$500	$1.5479
Sunflower Carriers	$1,250	$1.5470
Rainbow Exp Siv RW System	$100	$1.5384
Palmer Trucking Co Inc.	$150	$1.5000
Murphy E L Trk	$1,750	$1.4668
Tuscan Dairy Farms	$300	$1.4354
Best Pak Inc.	$50	$1.4285
Semes Motor Lines Inc.	$400	$1.4285
Depriest, Junior	$400	$1.3333
Reichhold Chemicals Inc.	$200	$1.3333
Hester Industries Inc.	$750	$1.3321
Andrew Van Lines	$1,200	$1.3274
Lott Motor Lines Inc.	$2,200	$1.3157
Moroney Body Works	$100	$1.3157
M K Trucking Inc.	$850	$1.2996
Bancroft Martin Inc.	$450	$1.2605
Days Pat Trailers	$100	$1.2500
F G R R Trucking Co.	$150	$1.2500
Sloat Farms Transport	$50	$1.2500
Taillon Crane Service	$250	$1.2500
J L T Inc.	$700	$1.2389
Coble Systems Inc.	$14,850	$1.2375

Registrant/Owner	Fuel License Cost	Cost Per Mile
Hartman H A Son Inc.	$100	$1.1904
Forney Ray J Inc	$100	$1.1764
D A D Transportation	$200	$1.1428
Midwest Refrg Exp Inc.	$5,700	$1.1425
Everette Truck Line Inc.	$600	$1.1363
UDS Truck Lease Inc.	$550	$1.1000
Schedules Truckway	$100	$1.0989
Schilli Motor Lines	$1,300	$1.0989
Butler Ventamatic Corp.	$150	$1.0869
Moran Crowley Environment	$300	$1.0869
Anty Trucking	$450	$1.0714
Neptune World Wide	$850	$1.0664
Harrington Richardson Inc.	$1,050	$1,0584
Treen, Fred G	$50	$1.0416
Fiamingo Moving & Storage Inc.	$50	$1.0416
Amusements of America	$2,000	$1.0288
MDR Cartage Inc.	$1,000	$1.0232
B Motor Freight	$100	$1.0000
Box Mountain Quarries	$50	$1.0000
Colonial Trucking Inc.	$200	$1.0000
Deane, Chaarles R	$50	$1.0000
Flynn, Daniel L	$50	$1.0000
Stgermain Transport Ltee	$600	$1.0000
Yonder Fruit Farms	$100	$1.0000
Pelletier E J Son	$150	$0.9375
Rynone Industries Inc.	$700	$0.9370
J B Hunt Transport Inc.	$6,000	$0.9175
Miller Auto Leasing	$50	$0.9090
Howard Indust Inc.	$900	$0.8849
Pirozzi, John V	$100	$0.8771
Stuart Transportation Co.	$2,850	$0.8731
Olson Fred Co Inc.	$150	$0.8670
National Car Rent Sys. Inc.	$23,350	$0.8579
Everett Piano Co.	$300	$0.8571
White Tiger Trans Inc.	$700	$0.8464

Registrant/Owner	Fuel License Cost	Cost Per Mile
Helman E Co Inc.	$350	$0.8454
Crete Carrier Corp.	$1,050	$0.8433
Arrowhead Mills Inc.	$100	$0.8333
Goodnow R H Const.	$50	$0.8333
H H Industrial Service	$50	$0.8333
Decarolis Truck Rental	$900	$0.8196
Johnson Acoustics Inc.	$100	$0.8196
Winegard Co.	$350	$0.8027
Central Trans	$900	$0.7971
Kivort Steel Inc.	$100	$0.7874
Crandall, Patrick	$50	$0.7812
Hartmans Inc.	$2,200	$0.7578
Word of Life Fellowship	$50	$0.7575
Heding Truck Service	$900	$0.7556
Standard Roofings Inc.	$150	$0.7500
Patrick Ind Inc.	$100	$0.7462
Seaboard Tank Line Inc.	$200	$0.7407
Gibbons John Inc.	$50	$0.7246
Cushman Rentals Limited	$950	$0.7142
Dutch Gold Honey Inc.	$100	$0.7142
Empire Silo Inc.	$50	$0.7142
Fairview Inc.	$300	$0.7058
Steven Freight Service Co.	$350	$0.7000
Getz William Z Inc.	$2,650	$0.6794
Hulcher Emergency Service Inc.	$600	$0.6703
Brown, Gordon R	$100	$0.6666
Ryback, John	$6100	$0.6666
Tenney, Harold S.	$50	$0.6666
Simco Heating Fuel Co Inc.	$100	$0.6666
Maddens Transfer Stge Inc.	$400	$0.6611
Fiberdome Inc.	$50	$0.6578
Findlay Truck Line Inc.	$100	$0.6578
Con Mac Trucking	$200	$0.6430
Carter Van Lines	$200	$0.6349
Colonial Rubber Works Inc.	$1,400	$0.6300

Registrant/Owner	Fuel License Cost	Cost Per Mile
A A Leasing	$100	$0.6250
Kelts, Phyllis	$50	$0.6172
J J Log Lumber Corp.	$300	$0.6097
Hertz Penske TK LSG	$85,000	$0.6024
Central Transport	$750	$0.6004
Howard Bown Corp.	$250	$0.5980
Scheib Floyd A Inc.	$200	$0.5934
Wilco Truck Rental Inc.	$6,900	$0.5934
Tallman Transport Inc.	$150	$0.5882
Carrier Transport Service	$100	$0.5847
Stanford Seed Co. Inc.	$350	$0.5833
Rounds, Ralph	$50	$0.5813
Leaseway Trans Leas Corp.	$5,750	$0.5764
All Corp.	$50	$0.5747
Taillon, Daniel	$100	$0.5714
E C Trkg	$50	$0.5681
Harrison Oil Corp.	$100	$0.5649
Caldeonia Lines Inc.	$300	$0.5555
Eastman, Roger H	$50	$0.5555
Durocher, Sylvain	$550	$0.5500
Roll On Inc.	$400	$0.5486
Kuhn Transportation Co.	$600	$0.5454
Weaver Nelson SDN Inc.	$50	$0.5434
Boyle Brothers Inc.	$250	$0.5422
Dana Trucking Co.	$250	$0.5411
Illinoise CA Express	$50	$0.5376
Lasalle Deitch Co Inc.	$200	$0.5376
Henry E E Inc.	$100	$0.5347
Reed, Deforest L	$200	$0.5347
Metals Engineering Corp.	$150	$0.5281
Miller Ceramics Inc.	$100	$0.5263
Schoch J Son	$50	$0.5263
Parlee Lumber Box Co Inc.	$100	$0.5208
Butler Trucking	$50	$0.5203
Chem Haulers Inc.	$600	$0.5194

Registrant/Owner	Fuel License Cost	Cost Per Mile
Transpo Intl Inc.	$400	$0.5188
B Right-Trucking	$150	$0.5136
Fenoff Construction	$50	$0.5102
Kilpatrick, Millard	$50	$0.5102
Sined Leas Inc.	$50	$0.5102
Stallman M H Co Inc.	$700	$0.5046
Allied Container Corp.	$200	$0.5000
Barrieau Express Inc.	$500	$0.5000
Bement, Oak L.	$50	$0.5000
Chapel Hill Fruit Distrib.	$50	$0.5000
Johnson Thomas Forest Pro.	$200	$0.5000
G. Carriers Inc.	$100	$0.5000
Saltmarsh, F W	$50	$0.5000
Viking Corrugated	$50	$0.5000
Wachusett Tea Co.	$300	$0.5000
Woburn Machine Co.	$50	$0.5000
Mariano Brothers Inc.	$200	$0.5000

43. The average motor carrier vehicle operating at 80,000 pounds gross vehicle weight experiences fuel consumption at 4.9 miles per gallon. The average motor carrier vehicles operating at 60,000 pounds gross vehicle weight experiences fuel consumption of 5.3 miles per gallon. The average motor carrier vehicle operating at 40,000 pounds gross vehicle weight experiences fuel consumption of 5.9 miles per gallon. The average motor carrier vehicle operating at 20,000 pounds gross vehicle weight experiences fuel consumption of 6.6 miles per gallon.

44. The chart annexed hereto as Attachment 3 summarized and compares the cost per mile of compliance with the Vermont fuel license and trip permit requirements for motor carriers with Vermont-based motor carrier vehicles and motor carriers with non-Vermont-based motor carrier vehicles based upon the aforementioned ATA surveys.

45. When motor carrier vehicles based in jurisdictions other than Vermont travel to Vermont, these vehicles travel an average of 116 miles over Vermont's highways per entry into the state.

46. In order to accommodate infrequent trips to Vermont by motor carrier vehicles based in jurisdictions other than Vermont, Vermont allows compliance with their laws by the display of a trip permit valid for seven days in lieu of any fuel tax and fuel user license. [23 V.S.A. 3010 and 415(c)] Prior to June 1981 each trip permit cost $20 and was in lieu of the highway use permit. Subsequent to June, 1981 and prior to the present legislation becoming effective, each trip permit cost $40 and was issued in lieu of the highway use permit and the entry fee. Subsequent to enactment of the present legislation each trip permit cost $50 and was in lieu of the fuel user license and fuel tax and the reporting requirements of 23 V.S.A. Chapters 7 and 27.

47. Although trip permits may be secured by mail from the Commissioner of Motor Vehicles, less than 1 percent of the trip permits issued are secured in this fashion because motor carriers: a) do not have adequate advance notice of the need for a trip permit to allow them to order permits in advance; and b) even where they do have such advance notice, the carrier most commonly does not have advance knowledge of which vehicle will be dispatched for the designated movement.

48. Over 99 percent of the trip permits used by motor carriers are secured through one of the several permit services which the Commissioner of Motor Vehicles allows to transmit trip permits. The permit services: a) accept orders for trip permits by telephone; b) issue the trip permit to the motor carrier; and c) transmit the permit by wire to any one of thousands of locations throughout the United States designated by the ordering motor carrier. These locations include: 1) permit service offices:

2) carrier offices or terminals; and 3) truck stops. The permit service pays the Commissioner of Motor Vehicles the required $50 fee for each permit it issues.

49. Although Vermont realized $50.00 in revenue for each trip permit issued, the motor carrier experiences a total cost which ranges from $56.50 to $63.00 per trip permit. This cost includes the permit fee and the permit service fee. The total permit cost is dependent upon the selection of the permit service, the location to which the permit is to be transmitted and the gross volume of business tendered by the motor carrier to the

50. The $50.00 annual vehicle fuel license fee is not intended solely as a means to defray the cost of administering the Non-diesel Fuel User's license tax and the Diesel Fuel Tax.

51. The $50.00 annual vehicle fuel license fee under Chapter 7 and Chapter 27 of Title 23 is a revenue raising tax imposed upon users of Vermont highways.

52. Attachment 4 is a tabulation of the fuel reporting laws of all fifty states and the District of Columbia with respect to annual vehicle permit fees.

53. The 1981 annual cost for state fuel tax permits assessed against Plaintiff Chemical Leaman in the forty-eight continental United States was approximately $164,976.00. If each such state were to assess annual fees equal to the $50.00 cost of the Vermont fuel license, the annual cost to Chemical Leaman for such state fuel tax permits would increase by approximately $1,462,235.00. Chemical Leaman's pretax net income for 1981 was $264,000.00.

54. The 1981 annual cost for state fuel tax permits assessed against Plaintiff Anderson Trucking in the forty-eight continental United States was approximately $74,775.75. If each such state were to assess annual fees equal to the $50.00 of the Vermont fuel license, the

annual cost to Anderson Trucking or state fuel tax permits would increase by approximately $870,274.00. Anderson Trucking's pretax net income for 1981 was $2,531,726.00.

55. The $50.00 diesel fuel and non-diesel fuel user's license fee is not related or intended to be related in any way to actual mileage travelled in the State of Vermont by the vehicle paying the fee.

56. Burnham Van Service, Inc. (Burnham) is a corporation organized under the laws of the state of Georgia with its principal place of business located at Columbus, Georgia. Burnham is principally engaged in the movement of household goods in interstate commerce as a common carrier certificated by the Interstate Commerce Commission at MC-682. Burnham provides their transportation services for customers between all points in the contiguous 48 states utilizing its own 21 terminals located in 12 states and the facilities of over 200 independent agents at locations throughout the 48 contiguous states.

57. During the period July 1, 1981 through June 30, 1982, Burnham secured 339 annual Vermont permits and 2 Vermont trip permits which, at the current cost of $50 each, represents an annual expense of $17,050 to qualify its vehicle to provide service for those moving their household goods to, from or through Vermont. During this period Burnham vehicles operated 14,310,647 miles everywhere and only 4,351 miles in Vermont. Based upon this previous experience, the Vermont fuel license expenses would represent a cost to Burnham of $3.9186 per mile for Vermont operations. Under the old system of $40.00 the per mile cost would have been $3.14.

58. Rollins Leasing Corporation (Rollins) is a corporation organized under the laws of the State of Delaware with its principal place of business in Wilmington, Delaware. Rollins is principally engaged in the leasing

and renting of trucks on both a long term and short term basis from 121 leasing and rental offices located in 32 states. Rollins' lessees operate Rollins trucks throughout the United States.

59. In order to assure that trucks are qualified to operate as required by Rollins' customers, Rollins qualifies their vehicles in almost all states. Leased vehicles are qualified to operate in the state designated by individual long term lessees. Rental vehicles, however, must be qualified to operate on a short term rental basis in a broad variety of states in order to assure Rollins ability to meet the needs of their rental customers and avoid both the expense of penalty impositions and customer embarrassment.

60. During the period July 1, 1981 through June 30, 1982 Rollins secured 1,421 annual Vermont permits and an additional 25 trip permits for their vehicles in order for those vehicles to be lawfully qualified for use in Vermont. The vehicles operated 279,592,180 miles everywhere and only 34,345 miles in Vermont during the same period. The aggregate cost of these permits at the current unit cost of $50 would be $72,300. On a mileage basis this fuel license expense would represent a cost of $2.1051 per mile. Under the old system of $40.00 the per mile cost would have been $1.68.

61. Southern Tier Hide and Tallow, Inc. (Southern Tier) is a corporation organized under the laws of New York State with its principal place of business in Elmira, New York. Southern Tier is principally engaged in the business of curing animal hides for sale to tanneries in the further manufacture of leather and leather products. Southern Tier makes delivery of their cured hides to tanneries by use of their fleet of private trucks to points in 14 states and the Canadian provinces of Ontario and Quebec.

62. During the period July 1, 1981 through June 30, 1982 the Southern Tier fleet of 6 trucks operated 328,805

miles everywhere and only 7 miles within Vermont. Southern Tier must, to satisfy its customer's demands, qualify its entire fleet in Vermont to assure the availability of its vehicles to deliver cured hides to its customer Pownal Tanning Company. The Southern Tier fleet qualification in Vermont cost $300 at the current cost of $50 each which would represent a cost of $42.8571 per mile of Vermont operations based on its prior experience. Under the old system of $40.00 the per mile cost would have been $34.28.

63. Century Manufacturing Company is a corporation organized under the laws of Minnesota with its principal place of business in Minneapolis, Minnesota. Century operates as a major manufacturer of electric arc-welders and electric battery chargers sold and serviced for customers located in all 50 states. Century operates a fleet of trucks in the private carriage of its products for delivery to customers and for the transport of product components from vendors to its manufacturing facilities throughout an area embracing all states east of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Arkansas and Louisiana with the exception of Vermont. Century's vehicles have not operated in Vermont since September 1982 and will not operate in Vermont as a result of the cost of the requirements imposed through enactment of No. 172 of the Acts of 1982 (1981 Adjourned) Session of the Vermont Legislature.

64. General Cable Company is a corporation organized under the laws of the State of Connecticut with its principal place of business in Greenwich, Connecticut. General is a manufacturer of various wire products manufactured at plants located throughout the United States including electric wiring custom manufactured in Verment. General is a supplier of electric cords manufactured to specifications for Century for use with their electric arc-welders and electric battery chargers. Since Century vehicles no longer operate in Vermont, General

must transport its electric cords for Century to another of its facilities in Massachusetts for reloading of the cords onto Century vehicles.

65. Claremont Lumber Company, Inc. (Claremont) is a corporation organized under the laws of the State of Maine with its principal place of business in Claremont, New Hampshire. Claremont operates a saw mill at its principal place of business manufacturing various lumber products for sale at wholesale with major emphasis on the manufacture of furniture grade products. Sawdust is a major by-product of its manufacturing process which historically has been sold to dairy farmers in the region for use as bedding required under rules of the United States Department of Agriculture.

66. Prior to July 1, 1982 Claremont provided deliveries of its sawdust to approximately 50 dairy farms in Vermont utilizing its own New Hampshire registered truck. Each delivery was of about 46 to 48 cubic yards and delivery frequency ranged from one per month to some smaller dairy farms to three times weekly for larger dairy farms.

67. On June 18, 1982 Claremont advised its Vermont sawdust customers that it would no longer make sawdust deliveries to points in Vermont because of the new requirements imposed by the Agency of Transportation as a result of enactment of No. 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature.

68. Of the original 50 Vermont dairy farms to which Claremont provided sawdust prior to implementation of the new law, four are continuing to receive sawdust from Claremont by using their own Vermont-based farm vehicles and the remainder are securing their sawdust from other sources.

69. The Notice of Class Action Certification required by the Court in its Order date November 30, 1982 was published in TRANSPORT TOPICS December 13, 1982.

70. Henry James Beli operates a small farm near West Arlington, Vermont and has one motor vehicle registered in Vermont for use in bringing farm supplies to his farm and delivering his farm products to market. His farm is not directly connected to any Vermont highway. The only access to his farm is from a New York State highway and, under these circumstances, his mailing address is located in Salem, New York, most of his farm supplies come from New York State sources and his farm products are sold in New York State markets.

71. Act No. 172 altered the fee structure paid to the State of Vermont by foreign registered motor trucks in the following manner:

(a) The $40.00 annual permit fee previously provided for under 23 V.S.A. 415 was replaced by a $50.00 annual diesel fuel user license fee (23 V.S.A. 3007) and a $50.00 annual non-diesel fuel users license fee (23 V.S.A. 415 as amended).

(b) The $40.00 single trip permit fee previously provided for under 23 V.S.A. 415a was repealed. This fee was replaced by a non-diesel fuel users single trip license fee at $50.00 (23 V.S.A. 415(C) as amended) and a diesel fuel users single trip permit fee of $50.00 (23 V.S.A. 3010(a)).

(c) The entry fee of $15.00 and $25.00 previously imposed under 23 V.S.A. 417 were repealed. A $10.00 retaliatory entry fee, which is not being contested in this case, was substituted for the previously imposed entry fees.

(d) A diesel fuel tax of 14 cents per gallon was imposed (23 V.S.A. § 3003).

72. All United States jurisdictions impose registration licensure with attendant fees on their domiciliary

motor trucks. Vermont's tax is set forth in 23 V.S.A. 362 and 367. The tax is based upon rates per 1,000 pounds which increase at interval weight levels of the vehicle. Sections 362 and 367 impose this registration tax on all trucks, without regard to domicile. 23 V.S.A. 411, however exempts from the payments called for under 362 and 367, all foreign trucks which have complied with the registration fees imposed by their own jurisdiction, which such jurisdiction affords the same reciprocity to Vermont domiciliaries. Virtually all motor trucks pass freely, as far as compliance with registration requirements are concerned in interstate commerce throughout the nation if they have complied with the registration requirements of their state of domicile. Such free passage between the states is based upon reciprocity agreements, understandings or declarations of the states pursuant to statutory authority similar to that found in 23 V.S.A. 411.

OPINION

In this class action, Plaintiffs challenge the constitutionality of certain fees imposed by the State of Vermont upon the use of motor trucks within the State. The statutes in issue, 23 V.S.A. § 3007 and 23 V.S.A. § 415, authorize an annual fee of $50.00 for diesel fuel and non-diesel fuel user licenses. 23 V.S.A. § 415(c) and 23 V.S.A. § 3010(a) impose a single trip permit fee of $50.00 which may be purchased in lieu of the annual license. Plaintiffs claim that the imposition of these fees on foreign-based trucks using Vermont highways violates the Commerce Clause, the Privileges and Immunities Clause and the Supremacy Clause of the United States Constitution and Chapter 1, Art. 9 of the Vermont Constitution.

A state is not barred from requiring interstate commerce to bear its fair share of the cost of providing benefits and protections for its activities. Therefore, a state tax on interstate commerce is valid if (1) it is applied

to an activity with a substantial nexus to the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1976). The practical effect of the taxing statute and not its formal language is controlling. *Id.*; *American Trucking Assns., Inc. v. Conway*, 142 Vt. 17, 21, 451 A.2d 42 (1982). Thus, although the licensing statutes contested herein are purportedly non-discriminatory on their faces, imposing a fee on all trucks weighing over 18000 pounds regardless of whether they are foreign or Vermont registered vehicles, constitutional scrutiny is not precluded. Our focus is not on the lack of overt disparity in the statutes, but rather on whether the fee system results in actual discrimination which has an adverse affect on interstate commerce.

Moreover, reluctant as this Court is to impute a discriminatory intent to the legislature, we cannot but be aware of the consequences of the most recent amendments to the licensing and registration statutes. Previous versions of 23 V.S.A. § 3007 and § 415 imposed a fee only on foreign-registered trucks weighing over 18000 pounds. When these statutes were attacked on constitutional grounds, the legislature enlarged their applicability to cover all trucks over 18000 pounds. Simultaneously, it reduced the registration fee for Vermont trucks by the amount of the fuel user license fee, $50.00. In practice, therefore, Vermont-registered trucks receive a credit in the amount of the license fee against the cost of registration.

Although Defendant would have this Court ignore the enactment of a registration fee deduction, we find its effect on the registration fee structure too irrational to be merely the result of benign legislative intent. Thus, we must consider both the registration and the licensing

fees in testing the instant taxing scheme by the four criteria noted above.

In determining whether the statutes at issue violate the Commerce Clause, we must compare "the costs imposed on foreign and domestic trucks in return for the services provided by Vermont." *American Trucking Assns. v. Conway, supra* at 21. "Only by comparing the cost per mile imposed by the fee systems on foreign as opposed to Vermont trucks can [the] Court assess whether the system . . . [is] actually discriminatory." *Id.* at 22.

The data submitted by the parties substantiates Plaintiffs' contention that out-of-state truckers are required to pay more in fees than are Vermont-registered truckers, when such costs are computed on a per mile basis. This additional cost per mile is not a result of additional services required for out-of-state trucks. We conclude, therefore, that the statutes contested herein unfairly discriminate against interstate commerce, in violation of the third prong of the *Complete Auto* test, and are not fairly related to the services provided by the State, in violation of the fourth prong.

The disparity between the costs imposed on Vermont and foreign registered trucks is far from insubstantial. Foreign registered trucks pay, on the average, .0632 cents per mile in user fees; Vermont registered trucks pay an average of .0029 in such fees. Attachment 3 clearly evidences the grossly unequal burden the present system imposes on foreign-based carriers. Moreover, if the deduction granted Vermont trucks is taken into account, the disparity between the fees imposed is even greater.

In practical effect, therefore, a Vermont-registered truck pays f[a]r less in average per-mile operating costs for the use of Vermont highways than does a foreign based vehicle. The difference in cost is not based on any

greater burden imposed on the Vermont highways by the foreign-based truck, nor any greater benefit derived by a foreign-based truck. No offset for the discrimination against interstate commerce is present either in complimentary domestic taxes or in other states' use permit fees. (See attachment 4). Many states impose no permit fee at all, and none impose a fee as high as Vermont does.

Since the discrimination against interstate commerce resulting from the contested permit system is not offset by complimentary domestic taxes or by foreign taxes, the statutes violate the Commerce Clause.

In view of the foregoing, it is hereby Adjudged and Decreed that sections 3007, 415, and 3010 are violative of the Commerce Clause of the U.S. Constitution.

Dated at Montpelier, Vermont this 31st day of August, 1983.

/s/ James L. Morse
JAMES L. MORSE
Presiding Judge

/s/ Willis C. Bragg
WILLIS C. BRAGG
Assistant Judge

/s/ NA
PATRICIA B. JENSEN
Assistant Judge

ATTACHMENT 1

VERMONT FOREIGN-BASED VEHICLE REGISTRANTS HIGHWAY USE OPERATING CHARACTERISTICS 7/01/81 - 6/30/82

Number of Carriers:	1,247
Number of Plates:	21,055
Number of Trip Permits:	2,818
Miles Everywhere:	6,760,855,458
Miles in Vermont:	18,890,483
Percent of Miles in Vermont:	0.28%
Total Plate Cost:	$1,052,750
Total Trip Permit Cost:	$ 140,900
Total Cost:	$1,193,650
Average Cost/Mile:	$ 0.0632

ATTACHMENT 2

VERMONT BASED VEHICLE REGISTRANTS
HIGHWAY USE OPERATING CHARACTERISTICS
7/01/81 - 6/30/82

Number of Carriers:	237
Number of Permits:	681
Miles Everywhere:	29,689,431
Miles in Vermont:	11,640,139
Percent of Miles in Vermont:	39.20%
Total Plate Cost:	$34,050
Average Cost/Mile:	$0.0029

ATTACHMENT 3

FUEL

VERMONT PERMIT FEE COST COMPARISON
VERMONT-BASED CARRIERS v.
FOREIGN-BASED CARRIERS
7/1/81 - 6/30/82

Vermont-Based			Foreign-Based	
% Total	Number	Cost/Mile	Number	% Total
0.42%	1	over 1.00	99	7.95%
0.00%	0	90-100¢	4	0.32%
0.00%	0	80- 90¢	15	1.20%
0.00%	0	70- 80¢	15	1.20%
0.00%	0	60- 70¢	17	1.36%
0.84%	2	50- 60¢	47	3.77%
0.42%	1	40- 50¢	41	3.29%
0.42%	1	30- 40¢	72	5.78%
0.42%	1	20- 30¢	140	11.24%
1.69%	4	10- 20¢	248	19.90%
0.00%	0	9- 10¢	22	1.77%
1.69%	4	8- 9¢	35	2.81%
0.84%	2	7- 8¢	42	3.37%
0.84%	2	6- 7¢	40	3.21%
2.95%	7	5- 6¢	49	3.93%
1.27%	3	4- 5¢	49	3.93%
2.11%	5	3- 4¢	67	5.38%
5.91%	14	2- 3¢	60	4.82%
12.24%	29	1- 2¢	90	7.22%
1.69%	4	0.9-1.0¢	12	0.96%
4.22%	10	0.8-0.9¢	11	0.88%
4.22%	10	0.7-0.8¢	8	0.64%
1.69%	4	0.6-0.7¢	17	1.36%
5.49%	13	0.5-0.6¢	11	0.88%
7.17%	17	0.4-0.5¢	14	1.12%
7.59%	18	0.3-0.4¢	8	0.64%
16.88%	40	0.2-0.3¢	9	0.72%
14.35%	34	0.1-0.2¢	2	0.16%
4.64%	11	under 0.1¢	2	0.16%

ATTACHMENT 4

Fuel Reporting Law Vehicle Annual Permit Fees
For the Fifty States and the
District of Columbia

State	Fee	State	Fee
Alabama	$12.00	Montana	$ .00
Alaska	.00	Nebraska	.00
Arizona	.00	Nevada	.00
Arkansas	10.00	New Hampshire	10.00
California	.00	New Jersey	6.00
Colorado	.00	New Mexico	.00
Connecticut	10.00	New York	.00
Delaware	10.00	North Carolina	1.00
Florida	8.00	North Dakota	.00
Georgia	3.00	Ohio	2.00
Hawaii	.00	Oklahoma	.00
Idaho	.00	Oregon	.00
Illinois	.00	Pennsylvania	25.00
Indiana	5.00	Rhode Island	10.00
Iowa	.00	South Carolina	4.00
Kansas	.00	South Dakota	.25
Kentucky	10.00	Tennessee	.00
Louisiana	.00	Texas	.00
Maine	10.00	Utah	.00
Maryland	25.00	Vermont	50.00
Massachusetts	10.00	Virginia	10.00
Michigan	12.00	Washington	.00
Minnesota	.00	West Virginia	10.00
Mississippi	12.00	Wisconsin	.00
Missouri	5.00	Wyoming	.00
		Dist. of Columbia	.00

APPENDIX H

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

Washington Superior Court

Docket No. S217-81 WnC

AMERICAN TRUCKING ASSOCIATION[S], INC.,
INTERNATIONAL TRANSPORT, INC., and
G. H. HARNUM, INC.

v.

WILLIAM CONWAY, PAUL PHILBROOK,
RICHARD SNELLING, and THOMAS EVSLIN

AMENDED FINDINGS OF FACT

This cause was remanded for further Findings of Fact by Entry Order of the Supreme Court, dated September 7, 1982. A conference was held on October 14, 1982, and proposed amendments to the original Findings of Fact and a Memorandum were filed on November 15, November 16 and November 17, 1982.

In accordance with the Remand Order and the Opinion of the Supreme Court, the trial court amends its original Findings of Facts as follows:

1. Add Finding No. 5A: "If Plaintiff International Transport, Inc., had tax costs per mile of operation under Act No. 87 in every state equal to its projected 36.257 cents per mile tax cost for operation in Vermont, the said Plaintiff would incur a total annual tax cost of approximately $32,000,000, which amount is far in excess of said Plaintiff's net earnings for 1980 of $3,724,227.65".

2. Add Finding No. 8A: "If Plaintiff G. H. Harnum, Inc. were subjected to per mile tax costs in all states identical to the projected 22.5 cents per mile tax costs for its operations in the State of Vermont under Act No. 87, the total annual tax cost to the said Plaintiff would be $279,225.00, a figure in excess of said Plaintiff's net corporate earnings for 1980".

3. Finding No. 11 is amended to read: "A survey conducted by Plaintiff of foreign motor carriers presently operating within the state of Vermont pursuant to 23 V.S.A. § 415 and § 417 indicates that the projected cost per mile *based on miles operated within Vermont in 1980* ranges from a high of $9.70 per mile to a low of 3.6 cents per mile. This computation includes the payment of the $15 fee under 23 V.S.A. § 417 for each trip into the state. *The average projected cost for all such foreign motor carriers is 18 cents per mile. The application of the $25 fee provided for under 23 V.S.A. § 417 to miles operated in Vermont in 1980 would result in a high cost per mile of $14.70 and a low cost of 5.7 cents a mile. The average cost for all such foreign carriers if the $25 fee was paid would be 26.3 cents a mile. Foreign-registered carriers that elect to use the § 415(a) single permit system, will experience a Vermont tax cost of 21.7 cents per mile based on their 1980 mileage*". [Added or changed wording is italicized.]

4. Finding No. 13 is amended to read: "Since Vermont registered motor trucks do not pay fees set forth in 23 V.S.A. § 415, § 415(a) and § 417, certain *individual* foreign motor carriers *enter the state so frequently that they would* in fact save in their costs of operation if they were to register some or all of their motor vehicles in the state of Vermont. *However, there is no credible evidence that the total of user fees paid per mile or pound of gross weight by all foreign-registered vehicles as a class for use of Vermont highways are higher than the total of such fees paid by all Vermont-registered*

vehicles as a class through registration fees and the Vehicle Purchase and Use Tax". [Added wording is italicized.]

5. Finding No. 17 is amended to read: "In the absence of the reciprocity *formerly provided under 23 V.S.A. § 419,* Vermont registered trucks with gross weight in excess of 18,000 pounds pay substantial highway user fees in numerous other states. In New Hampshire and New Jersey these taxes take the form of "counterpart" or "retaliatory" fees identical to the entry fees imposed upon foreign trucks using Vermont highways. [Added wording is italicized.]

6. Finding No. 19 is amended to read: "During the years 1978 and 1980, trucks weighing in excess of 18,000 pounds gross weight constituted approximately 9.89 percent of the total vehicular traffic on the state highway system and *contributed approximately 6 percent of such total vehicular traffic on all highways in Vermont (both the state highway system and the local road system)*". [Changed wording is italicized.]

7. Finding No. 20 is amended by striking "1979" in the first line thereof.

8. Add Finding No. 21A: "Total miles travelled on all Vermont highways in 1979 by all vehicles was 3,714,300,000 vehicle miles".

9. Finding No. 27 is amended to read as follows: "There is no evidence that *the total of* user fees paid PER MILE OR PER POUND OF GROSS WEIGHT by *all* foreign vehicles *as a class* for use of Vermont highways are higher than *the total of* such fees paid by *all* Vermont registered vehicles *as a class* through registration fees and the Vehicle Purchase and Use Tax". [Added wording is underlined and wording omitted in the Supreme Court opinion is capitalized.]

10. Add Finding No. 28: "As stated in summary form in the original Finding No. 27, there is no evidence

of the total costs and costs per mile for use of *Vermont* highways by trucks registered in Vermont, enabling a comparison to be made of such costs with those of the individual Plaintiffs or foreign-registered trucks as a class for use of Vermont highways. The only evidence on this issue—as to which no Requests to Find were originally made by Plaintiffs or Defendants—is insufficient and unsupported and does not permit the Court to reasonably make Findings based thereon".

11. Add Finding No. 29: "The Plaintiffs now request the Court to extrapolate and find, without benefit of any expert analysis, the comparative mileage costs for Vermont-registered trucks from the raw data contained in the 1977 Federal Census of Transportation (Plaintiff's Exhibit 7). This Exhibit contains *1977* mileage data for *combined interstate and intrastate operations.* In addition, there is no evidence in the record as to estimated truck useful life or any other factual basis for computing the average annualized Vermont Purchase and Use Tax payments by Vermont-registered trucks. Cost findings derived from this *1977* raw data *from combined interstate and intrastate operations* are simply not comparable to Plaintiff's cost data for foreign-registered trucks derived from *1980* operations *on Vermont highways,* without even considering the lack of foundation for making a per mile Purchase and use Tax allocation for Vermont-registered vehicles".

12. Add Finding No. 30: "The only other evidence in the record on the issue of comparative per mile costs is the unsupported opinion offered by witness McArthur for the State that miles travelled by Vermont-registered and foreign-registered trucks in *1979* were in the same proportion as vehicle counts in *1978* and *1980.* The witness did not give the breakdown of 1979 truck miles, gave no reason for his opinion and no supporting data. The Court, therefore, finds the opinion not credible".

13. Add Finding No. 31: "There is no credible evidence in the record from which the trial court can *for comparable time periods* determine the number of miles travelled *on Vermont highways* by trucks registered in Vermont (and thus the tax costs per mile) as opposed to the number of miles travelled *on Vermont highways* by foreign-registered trucks (and thus the tax costs per mile)".

14. Add Finding No. 32: "The specific impacts of the $40 permit and the $15 or $25 entry fee (23 V.S.A. § 415, 417) and the $40 single entry fee (23 V.S.A. & 415(a)) as to which there is evidence in the record are covered by findings Nos. 5, 8, 10, 11, 13, 22 and 23".

15. Add Finding No. 33: "There is no evidence in the record as to the impact of the Vermont registration fee and the Vermont Vehicle Purchase and Use Tax System except as discussed in Findings Nos. 28 and 29".

16. Add Finding No. 34: "Plaintiffs do not seek refund of taxes paid under the tax scheme in effect prior to Act No. 87 and thus findings on its separate or comparative impact are not required".

17. Add Finding No. 35: "A foreign-registered truck derives no greater benefit from and imposes no greater burden upon Vermont highways than does a Vermont-registered truck".

Dated this 5th day of August, 1983.

/s/ Edwin H. Amidon, Jr.
EDWIN H. AMIDON, JR.
Acting Superior Judge

/s/ Patricia L. Jensen
PATRICIA L. JENSEN
Assistant Judge

APPENDIX I

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

WASHINGTON SUPERIOR COURT

Docket No. S217-81 WnC

AMERICAN TRUCKING ASSOCIATION[S], INC.,
INTERNATIONAL TRANSPORT, INC., and
G. H. HARNUM, INC.

v.

WILLIAM CONWAY, PAUL PHILBROOK,
RICHARD SNELLING, and THOMAS EVSLIN

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT ORDER

This cause came on for hearing on the merits on August 6 and 7, 1981. Ralph Foote, Esq., and Robert Moyer, Esq., represented the Plaintiffs, and Robert Schwartz, Esq., represented the Defendants.

Findings of Fact

Based on the parties' Stipulation of Facts, the pleadings and the evidence at the hearing on the merits and the preliminary injunction hearing, the Court makes the following findings of fact:

1. The Court hereby adopts and incorporates by reference the Stipulation of Facts, filed August 6, 1981.

2. Plaintiff International Transport, Inc. registers approximately 1200 of its trucks in the State of Minnesota and 250 in the State of Oklahoma.

3. During the time period from September 1, 1979, through August 30, 1980 the total fleet mileage of International's tractors was 88,272,458 miles. International's mileage in the State of Vermont during the said time period was 34,434 miles. Vermont mileage as a percentage of total mileage during the said time frame was .039% or roughly 4 out of every 10,000 miles travelled by International's vehicles when taken as a whole.

4. In calendar year 1980, International's trucks made 227 entries into the State of Vermont and accrued registration fees under 23 V.S.A. 415, 415a and 417 of $4,540, representing a per mile cost of 13.196 cents.

5. Based upon the amendments to 23 V.S.A. 415, 415a and 417, International projects its annual costs to be approximately $12.485 in fees payable to the State of Vermont. This projection is based upon the number of entries into Vermont made by International Motor Trucks in calendar year 1980. Based upon that projected cost, and International's experience of 1980 for miles travelled within Vermont, International projects its cost per mile as approximately 36.275 cents.

6. G. H. Harnum, Inc. intends to qualify approximately 15 of its vehicles under the amendments to 23 V.S.A. 415 and to pay trip fees pursuant to 23 V.S.A. 417. If one of those 15 qualified vehicles is not available to bring freight into the State of Vermont at any given time, Harnum intends to transfer freight to such a qualified vehicle at its Massachusetts or New Hampshire terminals for delivery into the State.

7. Harnum's total fleet mileage for calendar year 1980 was approximately 1,241,000 miles. Its approximate mileage within the State of Vermont was 22,000 miles which constitutes roughly ½ of 1 percent of its total mileage.

8. Based upon its 1980 experience of 290 trips into the State of Vermont, Harnum projects its registration

costs under 23 V.S.A. 415 and 417 to be $600 for registration of 15 vehicles at $40 per vehicle, and $4,350 in trip fees for a total of $4,950. On a per mile basis, Harnum's cost per mile based upon its 1980 experience within the State of Vermont would be 22.5 cents per mile.

9. Due to the nature of the trucking industry, it is impossible for foreign motor carriers to determine how many or which of their motor trucks will be necessary or available for deliveries within the State of Vermont at any given time in the future. This is due to the necessity for flexibility in routing of trucks and the lack of advance notice as to where each individual truck will be needed at any given time.

10. The terms of 23 V.S.A. 415, 415a, and 417 impose a system of flat rates of payment triggered by entries into the State. When costs incurred by foreign motor carriers under those statutes are calculated on a per mile basis for operations within the State, different carriers pay very different costs per mile.

11. A survey conducted by Plaintiff, American Trucking Associations, Inc., of foreign motor carriers presently operating within the State of Vermont pursuant to 23 V.S.A. 415 indicates that the cost per mile ranges from a high of $9.70 a mile to a low of 3.6 cents a mile. This computation also assumes the payment of the $15 fee under 23 V.S.A. 417 for each trip into the State. The application of the $25 fee provided for under 23 V.S.A. 417 results in equally divergent, higher costs per mile for individual foreign motor carriers.

12. The lowest average mileage per trip into Vermont for any of the foreign carriers surveyed was by Twilight Color Chemical which entered the State 38 times in 1980, with a total mileage of 150 miles, for an average of 3.9 miles per trip. The highest average mileage per trip into Vermont for any of the foreign carriers surveyed was by

Everett Prescott, Incorporated which averaged nearly 450 miles per trip during 1980.

13. Since Vermont registered motor trucks do not pay fees set forth in 23 V.S.A. 415, 415a and 417, certain foreign motor carriers would in fact save in their costs of operation if they were to register some or all of their motor vehicles in the State of Vermont.

14. All of the United States jurisdictions impose registration licensure on the domiciliary motor trucks. It is thus a fact that virtually all motor trucks pass freely, as far as compliance with registration requirements is concerned, in interstate commerce throughout the nation if they have complied with the registration requirements of their state of domicile.

15. Wear and tear on any given portion of a highway is in direct proportion to the weight of the vehicle. Trucks of the plaintiff class impose significant wear and tear annually on Vermont highways. Vermont spends a significant portion of its available revenues annually in the repair of its highway system.

16. 23 V.S.A. 419, which was repealed pursuant to House Bill 248, effective July 1, 1981, authorized the Commissioner of Motor Vehicles to enter into reciprocal agreements with appropriate officials from other jurisdictions, excepting motor carriers from those jurisdictions from all or any portion of the fees described in 23 V.S.A. 415, 415a and 417, if such other jurisdictions exempted Vermont base-plated motor trucks from the payment of all or a portion of highway use fees imposed by such jurisdictions. At the time of repeal, such agreements were in force with 13 other States and the District of Columbia. As a practical result of the repeal of said statute, Defendant Conway cancelled nearly all existing reciprocal agreements as of June 1, 1981.

17. In the absence of reciprocity, Vermont registered trucks with gross weight in excess of 18,000 pounds pay

substantial highway user fees in numerous other states. In some states, such as New Hampshire and New Jersey, these taxes take the form of "counterpart" or "retaliatory" fees identical to the entry fees imposed upon foreign trucks using Vermont highways.

18. Trucks weighing in excess of 18,000 pounds cause considerably more wear and tear on highways than smaller vehicles and a large proportion of highway maintenance costs is attributable to usage by such vehicles.

19. During the years 1978 and 1980, trucks weighing in excess of 18,000 pounds gross weight constituted approximately 9.89 percent of the total traffic on Vermont highways and during the year 1979 constituted approximately 6 percent of such total traffic.

20. During the same years (1978, 1979 and 1980), approximately 53.9 percent of the trucks weighing over 18,000 pounds gross weight using Vermont highways were registered in Vermont and approximately 46.1 percent of such trucks were registered in other states or Canada.

21. In the years 1978 and 1980, 61.9 percent of "tractor semi-trailers" using Vermont highways were registered in other states or Canada and 38.1 percent were registered in Vermont.

22. Under the new entry fee system, trucks weighing in excess of 18,000 pounds gross weight registered in other states or Canada will in fiscal year 1982 pay approximately $7,500,000 into the "Transportation Fund" for construction and maintenance of Vermont highways.

23. Trucks weighing in excess of 18,000 pounds gross weight registered in Vermont will in fiscal year 1982 pay registration fees and purchase and use taxes of approximately $7,800,000 into the "Transportation Fund" for construction and maintenance of Vermont highways.

24. In fiscal year 1981, trucks weighing in excess of 18,000 pounds gross weight registered in Vermont paid $7,500,000 and such trucks registered in other states or Canada paid $2,700,000 into the "Transportation Fund".

25. Vermont State highways cost an average of $6,447.90 per mile to maintain in fiscal year 1981, for a total of approximately $16,887,000. (See Plaintiff's Exhibit 6 for total mileage of highways maintained by the State.)

26. Highway user fees charged to trucks registered other than in Vermont under the new entry fee system are not excessive in relation to the road privileges granted.

27. There is no evidence that the user fees paid per mile or per pound of gross weight by foreign vehicles for use of Vermont highways are higher than such fees paid by Vermont registered vehicles through registration fees and the vehicle purchase and use tax.

Conclusions of Law

The Court will first address Plaintiff's primary contention that the Vermont truck permit system for vehicles used in interstate commerce violates the Commerce Clause of the United States Constitution.

Complete Auto Transit, Inc., v. Brady, 430 U.S. 274, 279 (1977), holds that a State tax on interstate commerce will be sustained

> ". . . when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Plaintiffs take the position that the entry fee system discriminates against trucks registered outside of Vermont and that the fees are not fairly related to the serv-

ices provided by Vermont. No claim is made that Plaintiffs activities have an insufficient nexus with Vermont or that the entry fees are not fairly apportioned to activities within Vermont.

We conclude that the entry fees are not discriminatory since they form part of a single structure of user fees for Vermont roads and that the per entry measurement fairly relates the total fees paid to services provided to trucks registered in other states and Canada.

The Commerce Clause does not require that taxes or user fees be imposed upon interstate commerce in exactly the same form as taxes or user fees imposed upon domestic activities if the fees levied on interstate commerce are "compensatory" for taxes or fees levied on a similar event as a domestic tax or fee and there is substantial equality of treatment between local and interstate commerce. See *Maryland v. Louisiana*, 49 U.S.L.W. 4562, 4571 (1981); *H[e]nneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961).

Trucks domiciled in Vermont are required to pay substantial registration fees based upon weight and must also pay a purchase and use tax based upon purchase price, both paid into the "Transportation Fund". See Subchapter 2, Chapter 7 of Title 23 and 32 V.S.A. 8901 et seq. Subchapter 3, Chapter of Title 23 imposes entry or trip fees upon trucks registered in other states or Canada. There is no showing in this case that the amount of revenue collected from foreign trucks under the Vermont scheme is significantly disproportionate to that collected from Vermont registered trucks in terms of miles travelled, fuel usage or any other measure.

Plaintiffs argue that the user fees for foreign trucks constitute an additional discriminatory tax on them because they must also pay base registration fees in their State of domicile. This contention ignores the fact that Vermont registered trucks—which no longer have reci-

procity in other states due to the repeal of 23 V.S.A. § 419—must similarly pay so-called "third tier" user fees in other states. The desirability of reciprocity is a legislative rather than a judicial issue. So-called "third tier" fees over and above base registration fees and fuel taxes, although severely criticized by Plaintiff Association as an unwise exercise of legislative discretion, have long been held constitutional. See, *e.g.*, *B & L Motor Freight, Inc. v. Heymann*, 293 A.2d 711 (A.J. 1972).

We thus conclude that the Vermont truck permit fee system is a compensatory tax which does not discriminate against interstate commerce.

Plaintiffs' second argument under the *Complete Auto Transit* rule is that the trip fees collected by Vermont under Subchapter 3 are not fairly related to services provided by Vermont. The issue here is whether the Commerce Clause requires road usage fees to be computed in accordance with mileage or fuel use or whether a flat fee per trip is constitutionally permissible.

No case has interpreted the constitutionality of non-mileage related fees since the decision in *Commonwealth Edison Co. v. State of Montana*, 49 U.S.L.W. 4957 (July 1981) which held that the "measure of the tax must be reasonably related to the extent of the contact". 49 U.S.L.W. 4962. However, prior cases more closely on point have clearly held that the measure of the contact need not be precise and exact, and that a flat fee based upon weight or on the value of a vehicle is constitutionally permissible unless the *total* collected from *all* interstate users is proven to be excessive in relation to the road privileges granted. See *Capital Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Bode v. Barrett*, 106 N.E. 2d 521, 531-532 (Ill. 1952), aff'd, 344 U.S. 583 (1953).

In view of the strong presumption in favor of constitutionality and the fact that the ratio of total highway user fees paid by foreign trucks weighing in excess of

18,000 pounds gross weight under the new system to the total cost of maintaining Vermont highways closely approximates the ratio of usage of Vermont highways by such foreign trucks to the total usage by all such trucks, we conclude that the per entry measurement meets the reasonably related test of *Complete Auto Transit*. This conclusion is further supported by the apparent holding of *Commonwealth Edison Co., supra*, 4962, that a Court need not make a detailed factual inquiry into the relationship between revenues generated by a tax and costs incurred on account of the taxed activity and that the only issue under the fourth prong of the *Complete Auto Transit* test is whether the measure of the tax on its face bears any relationship to the amount of activity within the taxing State. In this case, the entry fee system is clearly proportional to activities by interstate carriers within the State, although not as precisely proportional as a mileage or fuel use tax.

We now turn to Plaintiffs' contention that the entry fee system for trucks based in other states violates the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution (§ 1 of the Fourteenth Amendment and Clause 3, § 8 of Article I) and the Proportional Contribution Clause of the Vermont Constitution (Chapter 1, Article 9).

The basic argument is that measurement of the road use tax by number of entries rather than a flat fee based upon weight or purchase cost as in the case of Vermont based trucks is a discriminatory and irrational classification. We disagree. The State claims that the purpose for the statutory distinction is to make road usage fees payable by foreign trucks more proportional to their actual usage of Vermont highways. We find this to be a reasonable and non-arbitrary distinction based upon the difference in level of usage of Vermont highways between individual Vermont-domiciled trucks and individual foreign trucks. See *Vermont Motor Inns, Inc. v. Town of Hartford*, 134 Vt. 52 (1975).

Plaintiffs also contend that the entry fees are void pursuant to the Supremacy Clause of the United States Constitution (Clause 2 of Article VI). The short answer to this argument is that 49 USC 11506, cited by Plaintiffs as authority for the proposition that Federal law has pre-empted at least the enforcement provisions of the Vermont entry fee system, covers only "State *registration* requirements" (emphasis supplied) and by its own terms does not apply to the highway use and trip permits required under 23 V.S.A. §§ 415, 415a and 417.

Judgment Order

It is hereby ordered and adjudged that Plaintiffs' action is dismissed with prejudice and that Defendants recover of Plaintiffs their costs of action.

Dated this 1st day of January, 1982.

/s/ Edwin H. Amidon, Jr.
/s/ Patricia D. Jones

APPENDIX J

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

WASHINGTON SUPERIOR COURT

Docket No. S-217-81

AMERICAN TRUCKING ASSOCIATIONS, *et al.*

vs.

WILLIAM CONWAY, Vermont Commissioner of Motor Vehicles, *et al.*

ORDER

This cause came on for hearing on June 3, 1981, on Plaintiffs' Application for Temporary Restraining Order. Ralph Foote, Esquire and Robert Moyer, Esquire represented the Plaintiffs and Robert Schwartz, Esquire represented the Defendants.

Based upon review of the pleadings and the evidence at the hearing, the Plaintiffs' Application for Temporary Restraining Order is hereby DENIED.

The Court concludes that the Plaintiffs have raised sufficiently serious issues relating to the constitutionality of the subject law as to make them a fair ground for litigation.

However, the Court finds that no irreparable injury will occur to Plaintiffs should the new fee system be permitted to go into effect. Defendants' records will permit any excess fees wrongfully collected to be exactly determined and speedily refunded to specific Plaintiffs

should they prevail on the merits. Also, issues as to lack of adequate notice of the reciprocity cancellations can be raised in any individual prosecutions which may occur as the result of driving unregistered vehicles during the next few weeks.

This cause is hereby advanced for early trial on the merits during the month of July, 1981.

Dated at Montpelier, Vermont this 4th day of June, 1981.

/s/ Edwin H. Amidon, Jr.
EDWIN H. AMIDON, JR.
Presiding Judge

APPENDIX K

UNITED STATES DISTRICT COURT
D. VERMONT

Civ. A. No. 81-155

AMERICAN TRUCKING ASSOCIATIONS, INC., INTERNATIONAL TRANSPORT, INC., and G. H. HARNUM, INC., Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Vermont Commissioner of Motor Vehicles, PAUL PHILBROOK, Vermont Commissioner of Public Safety, and RICHARD SNELLING, Governor of the State of Vermont, Each individually and in their official capacities

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May 29, 1981

MEMORANDUM OF DECISION

HOLDEN, Chief Judge.

Plaintiffs bring this action seeking declaratory, injunctive and monetary relief from recent amendments to Vermont statutes requiring the purchase of permits for interstate motor carrier vehicles registered out of state. The new amendments greatly increase the cost of the permits and remove exemptions for vehicles registered in other jurisdictions having a reciprocal fee waiver agreement with Vermont.

In considerable haste and with a strong sense of urgency, plaintiffs American Trucking Associations, Inc., International Transport, Inc., and G. H. Harnum, Inc.,

as individuals and representatives of a class of interstate motor carriers, on May 26, 1981 invoked the court's jurisdiction to obtain a temporary restraining order and preliminary injunction enjoining the defendant Conway, the Commissioner of Motor Vehicles for the State of Vermont, from assessing or collecting increased fees imposed by the enactment of the Vermont General Assembly of House Bill 248 which amended the fee levels previously set by 23 V.S.A. §§ 415, 415a and 417. Further equitable relief is sought to restrain the defendant Conway from terminating the reciprocal agreements with his counterparts in other states which had the effect of waiving the registration and license permits applicable to foreign registered motor truck carriers, as provided in 23 V.S.A. § 419. According to the complaint, the recision of the reciprocal agreements will become effective June 1, 1981, unless interdicted by injunctive relief emanating from this court prior to the effective date.

Upon consideration of the evidence and arguments presented at an expedited hearing May 28, 1981, the court finds there is a lion in the path of the equitable relief which the plaintiffs seek in this court. The barrier appears by way of the Tax Injunction Act of 1937, 50 Stat. 738, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act applies if the permit fees assessed in 23 V.S.A. §§ 415, 415a, and 417 constitute a tax within the meaning of Section 1341. This question is one of statutory construction, and is governed by federal law. The United States District Court for the District of Connecticut recently considered the "tax" question in regard to a similar fee assessed by the State of Connecticut. *American Trucking Association[s] v. O'Neill*, No. 81-267, slip op. at 3-7 (filed May 6, 1981). The

court found that the regulatory activities necessary to administer the registration statute could be funded for less than one percent of the revenue that would be generated from a $40.00 fee. *Id.* at 6. The Vermont fees, which are at least $40.00 per truck, must likewise exceed the administrative costs of the registration program. Moreover, the other indicia of a "tax," which include the earmarking of the collected fees for a general state fund, and the intent of the legislature to raise revenue, are present in the Vermont statute. The court concludes that the permit fees are a "tax" within the meaning of the Tax Injunction Act. This preliminary finding is based upon the papers submitted and the testimonial evidence adduced at the hearing on the motion for a temporary restraining order. The plaintiffs have simply failed to show that the permit fees have any other purpose than the generation of revenue for the State of Vermont.

The remaining question for resolution is whether the Vermont state courts provide plaintiffs with a "plain, speedy, and efficient remedy" to challenge the constitutionality of the tax The legislative history of the Act indicates that this language is intended to guarantee "a full hearing and judicial determination of the controversy." *Rosewell v. LaSalle National Bank*, —— U.S. ——, ——, 101 S.Ct. 1221, 1229, 67 L.Ed.2d 464 (1981) (citing 81 Cong. Rec. 1416). "The statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 97 S.Ct. 219, 222, 50 L.Ed.2d 227 (1976). As a result, if the state court system provides an *adequate* and *certain* remedy, the federal courts are barred from interfering.

Plaintiffs do not raise any issue as to the speed with which a remedy may be obtained in the state court system. Plaintiffs also concede that both declaratory and injunctive relief are available in the state system. Plain-

tiffs do, however, vigorously contest the adequacy and certainty of this remedy.

The United States Supreme Court has recently considered whether the availability of declaratory and injunctive relief in a state court system constitutes a certain (plain) remedy. *Tully v. Griffin, Inc., supra.* In *Tully*, the court held that the existence of New York case law establishing a right to preliminary relief in declaratory actions attacking the constitutionality of tax statutes provided a "plain" remedy. *Id.* at 76, 97 S.Ct. at 224.

The courts of Vermont have the power to grant injunctive and declaratory relief at an early sta[g]e of a controversy concerning a tax claim to be unlawfully imposed. *Gifford Memorial Hospital v. Town of Randolph*, 119 Vt. 66, 70, 118 A.2d 480 (1955). *Beebe v. Rupert*, 114 Vt. 172, 41 A.2d 149 (1945). *See also, Wheeler v. State*, 127 Vt. 361, 249 A.2d 887 (1969) *appeal dismissed* 396 U.S. 4, 90 S.Ct. 24, 24 L.Ed.2d 4, *reh. denied* (1969). Consequently, the court concludes a plain and certain remedy exists in the Vermont state courts within the meaning of 28 U.S.C. § 1341.

The remaining question is whether the state court remedy is adequate. Some decisions have impliedly equated this requirement with the requirement of an "adequate" legal remedy which would preclude equitable jurisdiction. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946). The court, however, does not read these decisions to limit the operation of the Tax Injunction Act to plaintiffs having a plain, speedy and efficient remedy at law in the state courts. *But cf. American Trucking Associations v. O'Neill, supra*, slip op. at 8 (a state remedy cannot be deemed adequate unless the state has provided a statutory right to recover tax payments). Such a construction ignores the congressional

purposes underlying the Act. The Act is not merely an expression of the concept of the rule that an adequate legal remedy precludes equitable jurisdiction; it also states firm principles of federalism. *Tully v. Griffin, Inc., supra,* 429 U.S. at 73, 97 S.Ct. at 222. To the same effect is the more recent pronouncement by the Court in *Rosewell, supra,* —— U.S. at ——, 101 S.Ct. at 1236. These principles dictate that the federal court abstain from granting equitable relief when the taxpayer can resort to the state court for relief adequate and equivalent to relief sought in the federal form. *Tully v. Griffin, Inc., supra,* 429 U.S. at 76, n. 8, 97 S.Ct. at 224 n. 8; *Garrett v. Bamford,* 538 F.2d 63, 68 (3d Cir. 1976) ("If plaintiffs could bring this action in Pennsylvania courts of equity, they would have an adequate remedy").

Plaintiffs conceded in oral argument that declaratory and injunctive relief is available to them in the Vermont state system, but expressed reservations regarding the ability of a Vermont court to reimburse them for fees illegally collected.[1] An award of monetary relief is within the equitable powers of the Vermont courts. *See Thompson v. Smith,* 119 Vt. 488, 510, 129 A.2d 638 (1957). The state courts can provide every kind of re-

[1] Plaintiffs stated at oral argument that the availability of a refund of illegally collected permit fees is only available under 23 V.S.A. § 328. This statute authorizes the commissioner of motor vehicles to refund money erroneously paid into the state treasury for registration of a motor vehicle. The court need not consider whether Section 328 provides a plain, speedy, and efficient remedy within the meaning of the Tax Injunction Act, since the court has concluded that other avenues of relief are available in the Vermont Superior Courts. The court notes, however, that defendant has submitted an affidavit indicating that relief under this section is regularly granted by the commissioner. Furthermore, the court believes that a review of an adverse determination by the commissioner would be available under the state administrative procedure act, 3 V.S.A. § 801 *et seq.* In particular, Section 815 authorizes an appeal from any final decision of an agency to the Vermont Supreme Court.

lief available in this court. Accordingly, the court finds that a plain, speedy and efficient remedy may be had in the Vermont courts.

Plaintiffs also have advanced several theories in an attempt to avert the application of the Tax Injunction Act. These theories include a private attorney general principle, and a statutory exception to the application of the Act, pursuant to 49 U.S.C. § 11503a(c). Neither of these theories is persuasive.

In summary, the court concludes that the Tax Injunction Act in the context of the record presented constitutes a jurisdictional barrier which deprives the court of jurisdiction to issue the temporary restraining order and preliminary injunctive relief sought by the plaintiffs. *Hickmann v. Wujick*, 488 F.2d 875, 876 (2d Cir. 1973). Plaintiffs' request for a temporary restraining order and preliminary injunction under Fed.R.Civ.P. 65 is denied. It is so ORDERED.

APPENDIX L

Vt. Stat. Ann. tit. 23, § 367 (Supp. 1982), *as amended by* 1981 (Adj. Sess.), No. 172, § 3 (1982) ("Act 172") reads in pertinent part as follows:

> The annual registration fee for truck-tractors and motor trucks with a gross weight of 18,000 pounds or over shall be $50.00 less than the fee computed in accordance with this subsection.

Vt. Stat. Ann. tit. 23, § 415 (Supp. 1981), *as amended by* 1981, No. 87, § 18 (1981) ("Act 87"):

> In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owing or operating a motor truck, as defined in section 420 of this title, upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for a highway use permit for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. The application shall be accompanied by a permit fee of $40.00 for each motor truck listed in the application. The commissioner shall issue a permit and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such permit and tag, plate or sticker shall become void on October 1 next following the date of issue. Such permits shall be carried in the motor truck and the tag, plate or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed seven days from

the date of issue of the permit. The telegram must be kept with the truck while being so operated.

The commissioner may issue a single trip permit, authorizing operation for one trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the permit. Single trip authorization must be kept with the truck while being so operated. The total cost of the permit and trip shall be $40.00 payable in advance.

Vt. Stat. Ann. tit. 23, § 415 (Supp. 1982), *as amended by* Act 172:

(a) In addition to any other provision of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by gasoline or any other non-diesel fuel, or fees paid therefor, a person owning or operating a motor truck upon the highways of the state, whether or not registered in this state, shall apply to the commissioner of motor vehicles for a non-diesel fuel user's license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. The application shall be accompanied by a license fee of $50.00 for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Except as otherwise provided, any such license and tag, plate or sticker shall become void on October 1 next following the date of issue. Such licenses shall be carried in the motor truck and the tag, place or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by tele-

gram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the truck while being so operated. This section shall not apply to motor trucks owned by federal, state, provincial or municipal governments.

(b) A person owning or operating a motor truck as defined in subsection (a) of this section which is registered in this state and for which the fees required under section 367 have been paid, shall not be required to obtain the license or pay the fee as required in subsection (a) until his next registration renewal and annually thereafter.

(c) The commissioner may issue a single trip license authorizing operation for the trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the license. Single trip authorization must be kept with the truck while being so operated. The total cost of the license shall be $50.00 payable in advance.

Vt. Stat. Ann. tit. 23, § 415, *as amended by* 1985 (Adj. Sess.), No. 124, § 10 (1986) ("Act 124"):

(a) In addition to any other provision of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by gasoline or any other non-diesel fuel, or fees paid therefor, a person owning or operating a motor truck upon the highways of the state, whether or not registered in this state, shall apply to the commissioner of motor vehicles for a non-diesel fuel user's license for each such motor truck to be so operated. Application sall be made upon a form prescribed by such commissioner and shall set forth such informa-

tion as the commissioner may require. The application shall be accompanied by a license fee of $50.00 for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Except as otherwise provided, any such license and tag, plate or sticker shall become void on January 1 next following the date of issue. Such licenses shall be carried in the motor truck and the tag, plate or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the truck while being so operated. This section shall not apply to motor trucks owned by federal, state, provincial or municipal governments.

(b) A person owning or operating a motor truck as defined in subsection (a) of this section which is registered in this state and for which the fees required under section 367 have been paid, shall not be required to obtain the license or pay the fee as required in subsection (a) until his next registration renewal and annually thereafter.

Vt. Stat. Ann. tit. 23, § 415a (Supp. 1981), *as amended by* Act 87:

The commissioner may issue a single trip permit, authorizing operation for one trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the permit. Single trip authorization must be kept with the truck while being so

operated. The total cost of the permit and trip shall be $40.00 payable in advance.

Vt. Stat. Ann. tit. 23, § 417 (Supp. 1981), *as amended by* Act 87:

(a) In addition to the foreign truck registration provided by sections 415-421 of this title, a person operating a motor truck on the highways of this state, which truck is registered in another state or province, shall pay a fee of $15.00 for each entry into the state. If more than one tax, fee or toll is imposed upon vehicle usage in another state, then there shall be charged an additional $10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

(b) In the event that a person so operates a motor truck on the highways of this state and fails to report that operation in accordance with regulations promulgated by the commissioner, the person shall pay a fee of $40.00 for each unreported entry into the state. The payment of the fee shall not preclude the imposition of penalties provided for in section 421 of this title.

Vt. Stat. Ann. tit. 23, § 417 (Supp. 1982), *as amended by* Act 172:

(a) If a ton-mile tax, or a tax requiring quarterly or monthly reporting is imposed on Vermont registered vehicles by another state in addition to that state's diesel fuel tax, then there shall be charged an additional $10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

(b) In the event that a person so operates a motor truck on the highways of this state and fails to report that operation in accordance with regulations

promulgated by the commissioner, the person shall pay a fee of $40.00 for each unreported entry into the state. The payment of the fee shall not preclude the imposition of penalties provided for in section 421 of this title.

Vt. Stat. Ann. tit. 23, § 421 (Supp. 1985):

(a) It shall be unlawful for any person:

(1) to operate a motor truck subject to the provisions of this chapter upon any public highway in the state without first obtaining the license, emergency telegram or single trip license and tag, plate or marker required under section 415 of this title or to so operate without carrying the license, emergency telegram or single trip license and displaying the tag, plate or marker if issued; or

(2) to violate any regulation issued by the commissioner pursuant to the authority granted hereunder; or

(3) to fail to file any return or report required by said commissioner;

(4) to make a false return or fail to keep records of operations as may be required by the commissioner; or

(5) to operate a motor bus subject to the provisions of this chapter upon any public highway in the state without first obtaining the marker or single trip permit required under section 422 of this title or to so operate without displaying said marker or without the single trip permit with the vehicle.

(b) Any person who violates any provision of subsection (a), upon first conviction shall be punishable by a fine of not less than $100.00 or more than $250.00; and upon a second or subsequent conviction of a violation occurring within one year after a

previous conviction of any provision of subsection (a) by a fine of not less than $250.00 or more than $500.00, or by imprisonment for not more than thirty days, or both.

Vt. Stat. Ann. tit. 23, § 3007 (Supp. 1982), *as amended by* Act 172:

(a) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck, which is registered in the state, using fuel as defined in section 3002, shall, for each motor truck to be so operated, apply to the commissioner of motor vehicles on or before July 1, 1982 for a diesel fuel user license, which shall be renewed at the time of renewal of the truck's registration. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Only applications filed at the time of the initial registration or renewal of a registration shall be accompanied by a $50.00 annual license fee for each motor truck listed in the application except that no fee shall be required for motor trucks with a gross weight of less than 18,000 pounds.

(b) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck using fuel, which is not registered in this state, shall apply to the commissioner of motor vehicles on or before December 1, 1982 for a diesel fuel user license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Except for motor trucks

with a gross weight of less than 18,000 pounds, and vehicles licensed prior to December 1, 1982 under section 415, the application for issuance of initial and renewal licenses shall be accompanied by a $50.00 license fee for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such license and tag, plate or sticker shall become void on October 1, 1983 and each October 1 thereafter. Such licenses shall be carried in the motor vehicle and the tag, plate or sticker shall be affixed to said motor vehicle and at all times be visible and legible. For emergency purposes, the commisisoner may by telegram, identifying the motor vehicle, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the vehicle while being so operated.

(c) A person owning or operating a motor bus upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for an identification marker as provided by section 422 of this title which shall be conspicuously displayed on the motor bus while operated within the state. The owner or operator shall be required to file a report under the provisions of section 3014 and pay the tax imposed by section 3003 under the provisions of section 3015.

(d) This section shall not apply to users obtaining trip permits under section 3010 or 422(b) or to users' vehicles exempt from reporting requirements under section 3014 or to users' vehicles exempt from taxation under subdivisions 3003(d)(3) and (5).

Vt. Stat. Ann. tit. 23, § 3007, *as amended by* Act 124:

(a) In addiiton to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck, which is registered in the state, using fuel as defined in section 3002, shall, for each motor truck to be so operated, apply to the commissioner of motor vehicles for a diesel fuel user license, which shall be renewed at the time of renewal of the truck's registration. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Applications filed at the time of the initial registration or renewal of a registration shall be accompanied by a $50.00 annual license fee for each motor truck listed in the application except that no fee shall be required for motor trucks with a gross weight of less than 18,000 pounds.

(b) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck using fuel, shall apply to the commissioner of motor vehicles for a diesel fuel user license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Except for motor trucks with a gross weight of less than 18,000 pounds, and vehicles licensed under section 415, the application for issuance of initial and renewal licenses shall be accompanied by a $50.00 license fee for each motor truck listed in the application. The commisisoner shall issue a license and an identification tag, plate or sticker for each such motor truck which tag, plate

or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such license and tag, plate or sticker shall become vaid on each January 1 thereafter. Such licenses shall be carried in the motor vehicle and the tag, plate or sticker shall be affixed to said motor vehicle and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor vehicle, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the vehicle while being so operated.

(c) A person owning or operating a motor bus upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for an identification marker as provided by section 422 of this title which shall be conspicuously displayed on the motor bus while operating within the state. The owner or operator shall be required to file a report under the provisions of section 3014 and pay the tax imposed by section 3003 under the provisions of section 3015.

(d) This section shall not apply to users obtaining trip permits under section 422(b) or to users' vehicles exempt from reporting requirements under section 3014 or to users' vehicles exempt from taxation under subdivisions 3003(d)(3) and (5).

Vt. Stat. Ann. tit. 23, § 3010 (Supp. 1982), *as amended by* Act 172:

(a) An unlicensed user may obtain a single trip permit which shall be good for one motor truck for a period not to exceed seven consecutive days beginning and ending on the dates specified on the face of the permit. The fee for the permit for motor

trucks with a gross weight of 18,000 pounds or over shall be $50.00. Fees for trip permits shall be in lieu of the tax otherwise payable by a user and no report under the provisions of section 3014 shall be required with respect to such motor vehicles. Single trip authorizations shall be kept with the vehicle while so being operated.

(b) Whenever the commissioner is satisfied that unforseen or uncertain circumstances have arisen which requires a user to operate in this state a motor truck for which no identification marker has been obtained, and if the commissioner is satisfied that prohibition of such operation would cause undue hardship, he may provide the user with temporary authorization for the operation of such motor truck pending payment of the license fee as required by section 3007(b). The fee for the temporary authorization for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00, and shall also constitute payment of the license fee required under section 3007 (b). Temporary authorizations shall be kept with the vehicle while being operated and shall authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed 21 days from the date of issue of the license.

Vt. Stat. Ann. tit. 23, § 3010, *as amended by* Act 124:

Whenever the commissioner is satisfied that unforeseen or uncertain circumstances have arisen which require a user to operate in this state a motor truck for which no identification marker has been obtained, and if the commissioner is satisfied that prohibition of such operation would cause undue hardship, he may provide the user with temporary authorization for the operation of such motor truck pending payment of the license fee as required by

section 3007(b). The fee for the temporary authorization for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00, and shall also constitute payment of the license fee required under section 3007(b). Temporary authorizations shall be kept with the vehicle while being operated and shall authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed 21 days from the date of issue of the license.

Vt. Stat. Ann. tit. 23, § 3020(b) (Supp. 1985):

(b) If the commissioner determines that a tax, penalty, interest or fee required by this chapter has been paid more than once by a licensee, or has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited to the tax account of the licensee, and the licensee shall be notified thereof by mail. Any balance of the excess amount remaining in the licensee's account after crediting the overpayment shall be refunded if requested within 30 days of the date of mailing notice.

Vt. Stat. Ann. tit. 23, § 3024 (Supp. 1985):

(a) Any person under this chapter who shall willfully: fail or refuse to pay the tax imposed or engage in any activity for which a license is required without having procured and maintained such license; fail to make any of the reports required; make any false statement in any application, report or statement required; refuse to permit the commissioner or any deputy to make the examination as provided by section 3013(c) of this title; fail to keep proper records of quantities of fuel received, sold, used or delivered in this state as required; make any false statement on any delivery ticket or invoice as to the quantity of fuel delivered, sold or used; make any false statement in connection with a report or an application for the refund of any monies or taxes; or

engage in any act or activity with the intent to evade payment to or prevent collection by the state of the tax imposed, shall be, in addition to any other penalties herein or elsewhere prescribed, guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than one year or both.

(b) It shall be unlawful for any person:

(1) to operate a motor vehicle subject to the provisions of this chapter upon any public highway in the state without first obtaining the diesel fuel users license and marker required under section 3007 of this title or to so operate without displaying said marker or to so operate without having in the vehicle either the license or telegram issued under section 3007 or a permit issued under section 3010 of this title;

(2) to violate any regulation issued by the commissioner pursuant to the authority granted hereunder; or

(3) to operate a motor truck without maintaining the log required by section 3025 of this title.

(c) Any person who violates any provision of subsection (b) shall be fined not more than $2,000.00 or not less than $500.00. Such penalty shall be in addition to the penalty imposed by any other section of this chapter.

Vt. Stat. Ann. tit. 23, § 328 (Supp. 1985):

Upon application of the commissioner, the finance director shall issue his warrant in favor of any person equitably entitled to a refund of money erroneously paid into the state treasury for the registration of a motor vehicle, trailer, semi-trailer or license. A refund shall not be allowed except as provided in this section and sections 325-327 of this title.